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Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning

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ARTICLES

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I. INTRODUCTION

According to the strict form of originalism, the Constitution derives its authority from its ratification during particular periods in American history. Under this view, any departure from the understandings of those discrete periods robs constitutional interpretation of its claim to legitimacy.[1] The political theory underlying strict originalism is a form of social contract theory: unelected judges may displace legislative decisions in the name of the Constitution, but *only* because the Constitution is a social contract to which consent was validly given through ratification.[2]

Although there are very few strict originalists,[3] virtually all practitioners of and commentators on constitutional law accept that original meaning has some relevance to constitutional interpretation.[4] Most, if not all, of us are what Paul Brest has called "moderate" originalists;[5] we are interested in "the framers' intent on a relatively abstract level of generality."[6]

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1. *See* Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 204 (1980) (describing strict textualism and strict intentionalism as two branches of strict originalism).

2. Originalists typically do not invoke social contract theory directly, instead arguing that original meaning should guide constitutional interpretation because the judiciary would otherwise be unconstrained. *See, e.g.*, RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 365 (1977) (noting "prevailing distrust of unbounded judicial interpretive discretion" during the Founding era); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 352 (1990) ("Once adherence to the original understanding is weakened or abandoned, a judge, perhaps instructed by a revisionist theorist, can reach any result . . . ."); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 45 (1997) (stating that "the difficulties and uncertainties of determining original meaning and applying it to modern circumstances are negligible compared with the difficulties and uncertainties of the philosophy which says that the Constitution *changes*"). But this invocation of the countermajoritarian difficulty does not explain why originalists choose original meaning as the vehicle for constraining judges. In my view, most arguments for relying on original meaning rather than some other constraint depend on the claim that the Ratifiers' views are preferred because their act of consent confers legitimacy on judicial power exercised in the Constitution's name. *See, e.g.*, BORK, *supra*, at 351-55 (implicitly adopting popular consent as the benchmark of legitimacy).

I do not contend that social contract theory in general entails originalism, however. One could, for example, rely on notions of tacit contemporary consent to existing structures as a justification for interpretation according to contemporary understandings. Alternatively, one might use an imaginary social contract as a vehicle for deciding what fundamental principles a society ought to endorse. *See, e.g.*, JOHN RAWLS, A THEORY OF JUSTICE 118-92 (1971). In this article, I generally use the term social contract theory to refer to theories that trace legitimacy to historical acts of consent. *See infra* note 41 (discussing the historical role of social contract theory in constitutional law).

3. Raoul Berger comes closest, perhaps. *See generally* BERGER, *supra* note 2.

4. *See* Sanford Levinson, *The Limited Relevance of Originalism in the Actual Performance of Legal Roles*, 19 HARV. J.L. & PUB. POL'Y 495, 495-96 (1996).

5. Brest, *supra* note 1, at 205.

6. *Id.* at 214. *See also* Cass R. Sunstein, *Five Theses on Originalism*, 19 HARV. J.L. & PUB. POL'Y 311, 313 (1996) (describing a "soft originalist" as one who "will take the Framers' understanding to a certain level of abstraction or generality").

Moderate originalism provides an incomplete descriptive account of modern constitutional law, however.[7] Squaring the existing constitutional order with original meaning requires either that we supplement the original understanding with additional interpretive devices[8] or that we describe the Framers' intent at such a high level of generality that it does not provide guidance in deciding most concrete cases. As a result, the moderate originalist judge must rely on factors other than original meaning in order to explain the existing constitutional order.[9] Thus, moderate originalism faces the challenge of justifying the use of nonoriginalist techniques without sacrificing its account of legitimacy.[10]

Many theorists reject the social contract theory that I believe underlies both strict and moderate originalism. Accordingly, they reject originalism as the proper starting point for constitutional interpretation. Needless to say, these nonoriginalists do not find the nonoriginalist elements of the existing constitutional order problematic.[11] Like moderate originalists, however, nonoriginalists encounter a gap between their normative and their descriptive accounts of constitutional law. The originalist must explain nonoriginalist decisions. Conversely, the nonoriginalist must explain the significant role that arguments based on original meaning play in constitutional law. Such gaps are problematic because theories of constitutional law usually strive for normative attractiveness as well as descriptive accuracy.

This article considers various approaches to narrowing the gap between theoretical accounts of original meaning and constitutional practice. In the first half of the article, I describe the efforts to bridge the normative/descriptive gap by scholars who accept the social-contractarian premises of originalism in one form or another. In the second half of the article, I propose an alternative account of arguments based on original meaning—one that for the most part does not rest on social-contractarian premises.

Part II describes Henry Monaghan's use of stare decisis to reconcile the existing nonoriginalist constitutional order with originalist tenets.[12] Although Monaghan's analysis proves instructive, he ultimately (and deliberately) raises more questions than he answers.

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7. *See* Brest, *supra* note 1, at 223-24.

8. *See id.* at 222-24; Sunstein, *supra* note 6, at 313-14.

9. One alternative, proposed by Alfred Hill, is to look to what the Framers would have thought about a constitutional question as it applies to our time, rather than looking to what they thought about the analogous question in their time. *See* Alfred Hill, *The Political Dimension of Constitutional Adjudication*, 63 S. CAL. L. REV. 1239, 1240 (1990). This approach may be more consistent with the Framers' goals than strict originalism. To my mind, however, this is merely the abstraction problem in a different form. How do we begin to answer the question of what James Madison would have thought about federalism in 1995 or of what the Reconstruction Congress would have thought about abortion in 1973? We fool ourselves if we believe that Hill's hypothetical enterprise produces answers beyond those we supply ourselves.

10. *See* Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723 (1988).

11. I include myself in the nonoriginalist category.

12. *See* Monaghan, *supra* note 10.

Part III construes Bruce Ackerman's *We the People*[13] as an effort to retain the social-contractarian premises of originalism while legitimating the open-ended approach to interpretation characteristic of the Supreme Court's most important nonoriginalist opinions. Yet the Part concludes that Ackerman's account is at most a theory of legitimacy, not one of interpretation, because his political theory does not generate the interpretive principles necessary to produce many of the landmark nonoriginalist precedents of the modern era. Part III ends by exploring a variant of Ackerman's approach recently proposed by Lawrence Lessig and concludes that this account shares the descriptive weakness of Ackerman's theory.

Part IV examines what I term "eclectic" accounts of constitutional law. Eclectics recognize that courts employ a variety of forms of argument—some based on social-contractarian premises, others not so based.[14] I identify Philip Bobbit[15] and Richard Fallon[16] as the proponents of the leading eclectic accounts. Although I find constitutional eclecticism somewhat appealing, I argue that eclectics have not yet explained how to integrate arguments that are based on seemingly inconsistent theories of legitimacy. For illustrative purposes I focus on one particular aspect of this difficulty—the failure of eclectics to provide an adequate explanation of how nonoriginalist arguments sometimes outweigh originalist ones.

A well-known example illustrates this particular weakness. In *Bolling v. Sharpe*,[17] the companion case to *Brown v. Board of Education*,[18] the Supreme Court held that the Fifth Amendment's Due Process Clause prohibits racially segregated public schools in the District of Columbia.[19] *Bolling* seems very difficult to reconcile with strict originalism; the slaveowners who ratified the Fifth Amendment probably did not imagine that it would require separate-but-equal schools—much less integrated ones—for African Americans.[20] A true strict originalist may have to conclude that *Bolling* is simply illegitimate and

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13. 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991).

14. I am using the term "eclecticism" more or less synonymously with Stephen Griffin's use of the term "pluralism." *See* Stephen M. Griffin, *Pluralism in Constitutional Interpretation*, 72 TEX. L. REV. 1753, 1753 (1994) (stating that "[p]luralistic theories of constitutional interpretation hold that there are multiple legitimate methods of interpreting the Constitution"). I prefer the former term because I wish to avoid two possible connotations of pluralism: first, its association with the concept of cultural pluralism; and second, its suggestion that there may be more than one right answer to a constitutional question. Eclecticism, as I use the term, entails no necessary view with respect to either of these issues.

15. *See* PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 11-22 (1991) (acknowledging and analyzing six forms of interpretive argument and their application).

16. *See* Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1209-30 (1987) (addressing problem of coherence where various constitutional arguments are used by courts).

17. 347 U.S. 497 (1954).

18. 347 U.S. 483 (1954).

19. *Bolling*, 347 U.S. at 499.

20. Indeed, long after the Founding, even in the North, free blacks were subject to segregated schools and transportation. *See* LEON F. LITWACK, NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES, 1790-1860, at 97-99 (1961).

therefore must be overruled. How would an eclectic reach a different conclusion?

The eclectic might initially argue that the Fifth Amendment must be read in the light of the Fourteenth Amendment, which prohibits states from denying citizens the equal protection of the laws. But then what role does original understanding play? The historical evidence indicates that even the Equal Protection Clause was not generally thought to prohibit racially segregated schools at the time of its adoption.[21]

Ultimately, the eclectic will remind us that she is, after all, not a thoroughgoing originalist. The fact that one factor—original understanding—points in the direction of a given interpretation is not sufficient to overcome the other factors, which here point in the opposite direction. Yet this maneuver tends to discredit the eclectic's invocation of history: sometimes she invokes history to support a conclusion she already endorses; other times she deems history outweighed or irrelevant. Perhaps this account accurately describes much Supreme Court practice, but it provides a weak normative basis for that practice.

In Parts V through VII, I propose a different method of integrating originalist and nonoriginalist arguments. I contend that most arguments based on original understanding need not rest on the social-contractarian assumptions of conventional originalism.

Part V identifies one reason why original meaning matters—even if one rejects the social-contractarian premises of conventional originalism. Once we accept that the constitutional text is binding law—for whatever reason or reasons—interpretation of the text will sometimes entail considering the meaning that the text was originally intended to bear. The history of the period surrounding the adoption of a constitutional provision may shed light on the kinds of problems that inspired an otherwise obscure clause. In other words, to make sense of text, we often need to know something about *context.*

I would be less than candid were I to claim that a scheme in which original meaning serves only to provide context for otherwise obscure provisions provides a complete descriptive account of the practice of constitutional interpretation. The Supreme Court continues to give arguments based on original meaning a considerably wider scope. Accordingly, Part VI proposes two related models

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21. For an excellent summary of the historical record, see Herbert Hovenkamp, *The Cultural Crises of the Fuller Court*, 104 YALE L.J. 2309, 2337-43 (1995) (reviewing OWEN M. FISS, TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910 (1993)). Hovenkamp notes that in its day, the separate-but-equal doctrine of Plessy v. Ferguson, 163 U.S. 537 (1896), was largely uncontested. Hovenkamp, *supra*, at 2339. The proponents of the Fourteenth Amendment, Hovenkamp argues, championed political but not social equality. *See id.* at 2340. He observes that under Reconstruction, the South moved from a regime of exclusion of blacks from public places and accommodations, to a regime of separate-but-equal. *See id.* at 2340-41. Although arguments can be constructed to cast some doubt on the historical consensus, *see* Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995), it remains the consensus. *See, e.g.*, Hovenkamp, *supra*, at 2342 (stating that historians who identify social integration with the prevailing view in 1868 or 1896 "are simply wrong"); Michael J. Klarman, Brown, *Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881 (1995).

for understanding the role such arguments play. The models do not rely on social-contractarianism, however.

I call the first noncontractarian model *ancestral* originalism. Under this model, studying the Framers' vision explains a good deal about the political system we have inherited in the same way that studying the history of a culture explains much about its present. I call the second model *heroic* originalism. Under heroic originalism, we value the Framers' views because we believe they were farsighted enough to create a Constitution that has endured for over two centuries, and because their philosophy of limited government and the means they chose to implement it remain remarkably relevant to our current problems. I contend that much of what passes for social-contractarian originalism in Supreme Court opinions may be better understood as some combination of ancestral and heroic originalism.

Part VI next explores the relation between pre- and post-enactment history under nonsocial-contractarian originalism. I contend that ancestral and heroic originalism fit within a larger view of historical argument in which the Nation's history both before and after the adoption of a constitutional provision teaches lessons about the provision's meaning. In some instances, post-enactment history will support the views of the Framers; in other instances, it will refute those views. Moreover, by focusing on the *lessons* of history, my proposed models provide a smoother boundary between originalist and nonoriginalist arguments than does conventional eclecticism.

Part VII acknowledges that contractarian originalism must play a small but significant role in constitutional interpretation because of our ultimate commitment to popular sovereignty. At least in the case of a recently enacted constitutional provision, the intent of the Framers and Ratifiers may be relevant in the conventional social-contractarian sense. During the period immediately following a provision's adoption, ignoring its intended effect can be tantamount to denying the People's right to make fundamental law.

Before elaborating on my thesis, I should say a few words about legitimacy. Theorists like Monaghan and Ackerman (as well as less sophisticated originalists) who begin with originalist premises treat legitimacy as the central question of constitutional law. Eclectics, by contrast, tend to elevate descriptive accuracy over legitimacy concerns. Indeed, Bobbitt, discussed in Part IV, believes that constitutional theory's usual concern for legitimacy is misguided from the outset.[22] Not surprisingly, legitimacy theorists and eclectics typically have little to say to one another.[23]

In seeking to bridge the gap between normative and descriptive accounts of constitutional law, I also hope to bring together the insights of both legitimacy

22. *See* BOBBITT, *supra* note 15, at 9-10.

23. Monaghan is an exception, as he clearly manifests an interest in both legitimacy and descriptive accuracy. *See infra* Part II.

theorists and eclectics. I do not think that legitimacy questions can be dismissed, but I also reject the social-contractarian account of legitimacy given by conventional originalism. Accordingly, to the extent that one believes that the social-contractarian premises of conventional originalism are necessary to maintain the legitimacy of constitutional interpretation, one will reject ancestral and heroic originalism. In my view, however, the legitimacy claims of originalists are unpersuasive.

We should be clear about why legitimacy concerns typically play such an important role in the debate over constitutional interpretation.[24] When the Supreme Court (or any other court) interprets the Constitution to bar state or federal action, the countermajoritarian difficulty arises.[25] What legitimates the Court's substitution of its view of the Constitution for that of a representative body? Social-contractarian originalism proposes to answer this question by denying that the Court substitutes its own view of the Constitution; rather, the Court substitutes the view of the Framers and Ratifiers.

There are two principal difficulties with this contractarian response. First, it is hardly self-evident that one can discern the views of the Framers and Ratifiers without engaging in a highly subjective interpretive enterprise.[26] Second, and perhaps more fundamentally, why should modern judges prefer the views of the Framers and Ratifiers to their own? The short version of the objection to social-contractarian originalism is that it replaces one countermajoritarian difficulty with another. Troubled by the prospect of unelected judges substituting their judgments for the judgments of elected legislators, originalists propose instead that judges defer to the views of the Framers and Ratifiers of the Constitution. Yet the Framers and Ratifiers do not represent current majorities,[27] and even in their day only represented a small subset of the adult population. Thus, originalism is not a normatively attractive solution to the countermajoritarian difficulty.

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24. It remains to be seen whether legitimacy concerns have practical importance. Alan Hyde has argued that as a causal matter, habit, fear of sanctions, and individual conviction explain why people submit to governmental authority to a greater extent than the hypothesis that they believe the government to be legitimate, *see* Alan Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 WIS. L. REV. 379, 386-400, and that even assuming legitimacy plays a causal role in ensuring stability, public perceptions of law play a negligible role in forming public opinion about legitimacy. *See id.* at 400-18. Hyde concludes that legitimacy "has no clear operational meaning, nor agreed upon empirical referent." *Id.* at 426. It does not follow, however, that legitimacy is a useless concept. In this article, I treat concerns about legitimacy as a particular subclass of concerns about justice. Legitimacy refers to the justice of institutional allocations of power, rather than to the justice of particular applications of governmental power. *But see id.* at 419 (contending that legitimacy is not a helpful concept for critiquing social institutions, although recognizing that social institutions may be "just or unjust").

25. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (1962).

26. Laurence Tribe and I have argued this point at some length elsewhere. *See* LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 31-64 (1991).

27. *Cf.* Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1046 (1984) (arguing that the countermajoritarian difficulty is in fact an "intertemporal" difficulty).

The authority of the Constitution today rests on its general acceptance as authoritative rather than on its adoption in 1787.[28] For example, constitutional *text* matters because of the widespread contemporary acceptance of the text as a necessary starting point for interpretation.[29] Nevertheless, as I argue in Part VII, there are circumstances in which something like the social-contractarian account of legitimacy ought to drive interpretation to give greater deference to original meaning than such original meaning would receive under a purely nonoriginalist approach.

On the whole, however, I take legitimacy to be a weak criterion for constitutional interpretation. Many different approaches to interpretation are legitimate in the sense that decisions rendered according to these approaches ought to and will be accepted as binding law. Beyond this minimal requirement, though, legitimacy should not be viewed as an on/off condition. Instead, legitimacy should be viewed as a matter of degree: That one interpretive technique is, in some cases, *more* legitimate than another does not render the less legitimate approach *illegitimate*. Therefore, the minimal requirement of legitimacy does not dictate any particular interpretive theory. Instead, the degree of legitimacy of an interpretive technique is merely one of many factors that may recommend it.

The ultimate test of any constitutional theory is two-fold: how well does it describe the actual practice of constitutional law and how well does it justify that practice?[30]—in short, how well it bridges the descriptive/normative gap. A largely nonsocial-contractarian account is best suited for this task.

II. STARE DECISIS AND CONSTITUTIONAL LAW

Suppose that a judge believes that the only legitimate method of interpreting the Constitution requires her to apply its provisions as they were generally understood at the time of their adoption. Perhaps she holds this view because

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28. *See* Richard Fallon, *The Rule of Law as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 27 (1997) ("The Constitution . . . is law not because the Framers and Ratifiers said so, but because we today accept it as such." (citing Frederick Schauer, *Amending the Presuppositions of a Constitution*, *in* RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 145, 152-53 (Sanford Levinson ed., 1995))); Kent Greenawalt, *The Rule of Recognition and the Constitution*, 85 MICH. L. REV. 621, 640 (1987) (contending that "the legal authority of . . . the original Constitution is established by its continued acceptance and that the original ratification procedure is no longer directly relevant to tracing what counts as law"). Locating the source of the Constitution's *authority* in its general acceptance does not necessarily entail any particular approach to *interpretation*. *See* RONALD DWORKIN, LAW'S EMPIRE 124-30 (1986) (distinguishing between "strict" and "soft" conventionalism as interpretive philosophies, and allowing that the latter may be an underdeveloped version of Dworkin's model of law as integrity); *id.* at 138 (contending that most basic propositions in Anglo-American law rest on argument rather than on convention, but allowing that "[p]erhaps all judges do accept the authority of the Constitution as a matter of convention rather than as the upshot of sound political theory").

29. *See* DWORKIN, *supra* note 28, at 358 ("Justices who are called liberal and those who are called conservative agree about which words make up the Constitution as a matter of preinterpretive text.").

30. *See id.* at 90 ("General theories of law . . . try to show legal practice as a whole in its best light, to achieve equilibrium between legal practice as they find it and the best justification of that practice.").

she believes that originalism alone can adequately constrain unelected judges, or perhaps she believes—as a matter of social contract theory—that the maintenance of constitutional legitimacy requires strict adherence to the original understanding of the contract.[31]

For now, however, let us put aside the question of *why* one might choose to be a strict originalist. There remains the more basic question of *whether* one can be a strict originalist. As an example, assume a newly appointed originalist majority on the Supreme Court. Must these Justices overrule *Brown v. Board of Education*, invalidate the administrative state, and abolish paper money? If these pillars of the modern regime conflict with the original understanding, it would seem that our originalist Court must either sacrifice them or sacrifice its principles.[32]

In an important and carefully argued article, Henry Monaghan asks whether stare decisis can bridge the gap between the modern constitutional regime and original understanding.[33] Monaghan begins with the frank admission that "a significant portion of our constitutional order cannot reasonably be reconciled with original understanding."[34] He then argues that, at least in very important cases,[35] stare decisis plays a vital role in legitimating the constitutional order and, in lesser cases, promotes a conception of the law as impersonal.[36]

Monaghan might at this point try to argue that stare decisis enables originalist judges to retain the modern constitutional order through a ratchet mechanism: old nonoriginalist precedents would be respected while new cases would be decided on originalist premises. But such an approach would fail. First, it is not clear how one would distinguish between "old" and "new" principles. The Supreme Court rarely hears cases that present completely novel questions. The typical case includes an inquiry into how far precedential cases extend and whether those cases cover the instant case.[37] To respect nonoriginalist precedents would thus appear to require that they not merely be retained on their facts, but that they also be permitted to expand to cover new situations.

More fundamentally, because Monaghan justifies the role of stare decisis in instrumental terms, he opens the door for the justification of other nonoriginalist sources of law. Both stare decisis and originalism contribute to the stability of our legal system, but so do other interpretive techniques. For instance, if the

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31. *See* Monaghan, *supra* note 10, at 739-41.

32. There is another sense in which it may not be possible to be an originalist. Sources of original meaning are sometimes indeterminate, so that an interpreter will have to look to other sources to decide a case. *See* Brest, *supra* note 1, at 209-17.

33. *See* Monaghan, *supra* note 10.

34. *Id.* at 723.

35. Monaghan states that stare decisis performs the function of limiting the agenda of constitutional adjudication in such cases, whether or not they were rightly decided in the first instance. *See id.* at 744-46.

36. *See id.* at 749-53. The majority in Planned Parenthood v. Casey, 505 U.S. 833 (1992), sounds similar themes. *See id.* at 864-69.

37. Monaghan, *supra* note 10, at 765. *Accord* Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2056-57 (1994).

public or a significant fraction of the public perceives some substantial set of judicial decisions as manifestly unjust, the system's stability will be undermined. Therefore, the concern for stability should permit judges to interpret the Constitution so that it conforms with contemporary notions of justice, even when those notions contradict original understanding. Thus Monaghan approves of the nonoriginalist decision in *Brown v. Board of Education*.[38] Today that decision may rest firmly on the ground of stare decisis, but when decided it was justified in other, nonoriginalist terms.

Although he begins with a philosophical commitment to something like strict originalism, Monaghan's pragmatism ultimately leads him to an eclectic approach to interpretation. Having demoted originalism from a matter of first principle to a policy that judges should follow on the basis of a consequentialist calculation, he cannot avoid other such calculations. Original meaning thus joins "precedent, political equilibrium, and the need for change," as one of the factors that judges should consider in constitutional decisionmaking, rather than maintaining its position as the sole factor.[39] As Monaghan recognizes, however, the theory that justifies originalism as an all-encompassing ideology must differ from one that embraces it only partially.[40] He leaves the construction of this latter theory to others.

III. A KINDER, GENTLER ORIGINALISM

The social-contractarian political theory underlying originalism has deep roots in American legal thought.[41] Therefore, theorists trying to account for the

38. *See* Monaghan, *supra* note 10, at 772-73.

39. *Id.* at 773.

40. *See id.*

41. *See, e.g.*, Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) (Chase, J.) (stating that a statute that violates "the great first principles of the social compact[] cannot be considered a rightful exercise of legislative authority"); Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 471 (1793) (Jay, C.J.) (stating that "the constitution of the United States is likewise a compact made by the people of the United States"). *See also* Hovenkamp, *supra* note 21, at 2317-18 & nn.46-49 (collecting state and federal cases invoking social contract theory). Hovenkamp notes that during the nineteenth century, the Supreme Court most commonly invoked social contract principles to invalidate legislation when no constitutional text clearly controlled. *See id.* at 2318-19. Late-twentieth-century originalists are unlikely to endorse this version of social contract theory.

Social contract theory can have concrete consequences in the courts. For example, in United States v. Verdugo-Urquidez, 856 F.2d 1214 (9th Cir. 1988), *rev'd*, 494 U.S. 259 (1990), a nonresident alien raised a Fourth Amendment objection to the conduct of United States officials acting outside the United States. The government argued that as a nonresident alien, the defendant was not a party to the constitutional compact between the United States and its People. *See id.* at 1218. The court of appeals majority acknowledged that the "compact theory of the Constitution has deep roots in our nation's history," *id.* at 1219, but went on to argue that the compact theory is incomplete, emphasizing the parallel natural rights tradition, under which rights such as those contained in the Fourth Amendment belong to all people, even prior to their expression in the constitutional text. *See id.* at 1219-20. Accordingly, the court held that the defendant could raise the Fourth Amendment issue. Noting the Founders' debt to John Locke, the dissent argued that the social contract view was the prevailing one, and accordingly would have ruled that the defendant could not assert Fourth Amendment rights. *See id.* at 1231-33 (Wallace, J., dissenting). *See also* Davis v. Fulton County, 884 F. Supp. 1245, 1254 n.7 (E.D. Ark. 1995) (noting that social contract theory "seems to have informed[] our Nation's founders").

existing nonoriginalist constitutional order often succumb to the temptation to modify rather than to abandon originalism. In this Part, I argue that Bruce Ackerman's much-discussed *We the People* accepts the social-contractarian premises of conventional originalism, and consequently provides an inadequate descriptive account of constitutional law. I then consider a variant of Ackerman's approach recently offered by Lawrence Lessig, about which I draw the same conclusion.

A. WE THE PEOPLE

In the first[42] volume of *We the People*, Bruce Ackerman sets for himself the task of liberating American constitutionalism from foreign influences.[43] He seeks an interpretive method grounded in characteristically American political thought.[44] He finds it in what he calls "dualist democracy" (or sometimes, simply "dualism")[45] which encompasses the idea that American law proceeds on two tracks: the higher track of fundamental law deriving from the People themselves, and the lower track of ordinary legislation enacted by representative bodies that comprise a mere shadow of the People.

Ackerman devotes much of *We the People* to showing that the processes of constitutional amendment set out in Article V are not the exclusive means of lawmaking on the higher track. Thus, Ackerman claims legitimacy for the Fourteenth Amendment despite the fact that the Article V ratification procedures were not strictly followed.[46] More radically, he argues that the Supreme Court decisions of the late 1930s and 1940s constituted an informal constitutional amendment approving the growth of the modern administrative state.[47] Unsurprisingly, claims such as these[48] have inspired vigorous criticism by scholars claiming that Ackerman's approach diverges too far from both the text and the traditional understanding of the Constitution.[49]

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42. As of this writing, the second volume of *We the People*, subtitled *Transformations*, is expected to be published in early 1998. Conversation between Bruce Ackerman and Michael Dorf (April 17, 1997).

43. *See* ACKERMAN, *supra* note 13, at 3-6.

44. *See id.*

45. *Id.* at 6. Ackerman's use of "dualism" should not be confused with a different American invention, dual sovereignty—the notion that state and national governments exercise overlapping sovereignty. *See, e.g.*, U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842, 1872 (1995) (Kennedy, J., concurring) (stating that "[f]ederalism was our Nation's own discovery").

46. *See* ACKERMAN, *supra* note 13, at 42, 44-47, 81-104.

47. *See id.* at 42-44, 47-50, 105-130.

48. More recently, Ackerman and David Golove have invoked the theory of informal amendment to validate the use of Congressional-Executive agreements in lieu of the treaty power. *See* Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 805 (1995).

49. *See, e.g.*, Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995). *Cf.* Henry P. Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121 (1996) (critiquing the claim of Akhil R. Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457 (1994) and Akhil R. Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043 (1988), that the Constitution permits amendments by a simple majority vote of the People).

The debate inspired by Ackerman's work should not obscure the fact that at an important level his description is widely accepted. Dualism is, by and large, an accurate account of American constitutionalism. Indeed, the point seems so obvious as hardly to require an elaborate theoretical defense. The Preamble[50] invokes the authority of "We the People of the United States." The Supremacy Clause[51] declares the Constitution to be higher law. Only a particularly near-sighted reader of the Constitution could fail to notice the dualist character of the system that it erects.[52]

However, the fact that the *text* of the Constitution embraces dualism does not suffice to show that the constitutional order is itself dualist. If it did, Ackerman could not seriously advance his theory of informal constitutional amendments. For Ackerman, text is merely one source of constitutional meaning, and not a very important one at that.

To put the matter somewhat differently, Ackerman does not accept the moral legitimacy of the words of the Constitution simply because the Constitution claims legitimacy for itself in dualist terms. What if someone were to print an alternative, say monarchist, constitution which declared *itself* to be the supreme law of the land?[53] Correctly sensing that the text of the Constitution alone cannot respond to such a challenge, Ackerman looks for a response in external sources. For him, the possibility of an alternative constitution—or to make the matter somewhat more realistic, a group of persons who deny the rightful authority of the legal order over their lives—poses a challenge to the legitimacy of the Constitution.

Despite the apparent radicalism of Ackerman's views about informal constitutional amendments, his theory of legitimacy is extremely conventional. The Constitution derives its legitimacy from the fact that the People, exercising their higher lawmaking authority, approved it. Although Ackerman differs with strict originalists on a number of important details, his basic philosophical commitments remain remarkably compatible with those of strict originalism. To understand the extent of this compatibility, consider the ways in which Ackerman parts company with strict originalism.

First, for Ackerman the higher law status of the Constitution plays an important role in constitutional interpretation—whereas strict originalists tend to treat constitutional interpretation no differently from the interpretation of some relatively minor regulatory statute.[54] At least as it is often caricatured,

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50. U.S. CONST. pmbl.

51. U.S. CONST. art. VI, § 2, cl. 2.

52. *See* Suzanna Sherry, *The Ghost of Liberalism Past*, 105 HARV. L. REV. 918, 923 (1992) ("At its simplest level, Ackerman's basic dualist thesis is unexceptionable."); *id.* at 927 (remarking that Ackerman's historical account "requires a 'dualistic' view of the Constitution [only] in the most trivial sense").

53. *See* Brest, *supra* note 1, at 225 ("[a]lthough Article VI declares that the Constitution is the 'supreme law of the land,' a document cannot achieve the status of law, let alone supreme law, merely by its own assertion.").

54. *See* ACKERMAN, *supra* note 13, at 92-92.

strict originalism assumes that each constitutional provision is a kind of statute designed to accomplish a narrow task, so that it is appropriate to look at the Framers' or Ratifiers' views at a quite specific level.[55]

Ackerman, by contrast, is a Marshallian when it comes to constitutional purposes.[56] He recognizes a significant role for the interpreter in filling gaps in the broad outline of the Constitution.[57] Thus, *We the People* includes a spirited attack on the view that judges should not interpret the Constitution differently from a minor statute.[58]

Yet Ackerman's sympathy for broad interpretations is not a repudiation of originalism so much as a refinement of it. Even John Marshall, after all, invoked the intent of the Framers in the course of his broad structural arguments. In *McCulloch v. Maryland*,[59] for example, Marshall prefaced his paean to the breadth of constitutional purposes[60] with an invocation of the Framers' purposes.[61] And, in a familiar move, Ackerman critiques the narrowest version of strict originalism by noting that the Framers themselves never intended for future interpreters to follow their views—especially their subjective views—slavishly.[62]

When scholars point out that strict originalism is paradoxically self-defeating, they often do so in order to show that the theory fails even on its own terms.[63]

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55. This narrow approach does not even command the field of statutory interpretation. For a different approach to statutory interpretation, see WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994).

56. By "Marshallian," I mean one who believes with John Marshall that the Constitution should be broadly construed in the light of its evident purposes. *See, e.g.*, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

57. *See, e.g.*, Bruce Ackerman, *Robert Bork's Grand Inquisition*, 99 YALE L.J. 1419, 1430-34 (1990) (book review criticizing Bork's parsimonious reading of the Ninth Amendment).

58. *See* ACKERMAN, *supra* note 13, at 90-92.

59. 17 U.S. (4 Wheat.) 316 (1819).

60. *See id.* at 407 ("A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves . . . . In considering this question, then, we must never forget, that it is *a constitution* we are expounding.").

61. *See id.* at 406-07 (stating that "[t]he men who drew and adopted [the Tenth Amendment] had experienced the embarrassments resulting from the insertion of [the] word ['expressly'] in the articles of confederation, and probably omitted it to avoid those embarrassments").

62. ACKERMAN, *supra* note 13, at 90-92 (criticizing Raoul Berger's view that the Fourteenth Amendment should be interpreted as doing no more than authorizing the Civil Rights Act of 1866). *See also* Hans W. Baade, *"Original Intent" in Historical Perspective: Some Critical Glosses*, 69 TEX. L. REV. 1001, 1007 (1991) (criticizing Raoul Berger's variant of originalism because it contradicts the English common-law rule that evidence of legislative history was inadmissible for statutory interpretation); Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1090 (1981) (criticizing Raoul Berger's view that the adopters of the Fourteenth Amendment intended its provisions to be interpreted by "strict intentionalist canons").

63. *See, e.g.*, TRIBE & DORF, *supra* note 26, at 9-10; Baade, *supra* note 62, at 1004 ("An ahistorical 'originalism' . . . is barely short of a contradiction in terms.").

But that is not Ackerman's goal. Ackerman, working from social-contractarian premises, draws from the original understanding of the Framers and Ratifiers the lesson that the constitutional interpreter should strive to effectuate the broad purposes of the text approved by the People during earlier periods. Thus, Ackerman's first point of departure from strict originalism—his substitution of a broad view of original meaning for a narrow view—is consistent with the philosophical premises of strict originalism. He seeks to improve social-contractarian originalism rather than to replace it.

The second point at which Ackerman departs from strict originalism concerns intergenerational synthesis.[64] Where a strict originalist might take the view that a judge must enforce the meaning of a clause under construction at the time of the particular clause's enactment, Ackerman recognizes the need to synthesize portions of the Constitution enacted during different eras to create a coherent interpretation of the entire document. Thus, for Ackerman, a case such as *Lochner v. New York*[65] reflects the efforts of the Justices of the post–Civil War era[66] to synthesize the Founders' commitment to individual liberty and the Reconstruction Era's commitment to equality and restraints on state action.[67] Similarly, he contends that *Griswold v. Connecticut*[68] reflects the modern Court's effort to preserve a zone of liberty traceable to the Founding era given the New Deal era's recognition of broad government power over economic affairs.[69]

Although Ackerman's particular account of intergenerational synthesis is problematic in ways I discuss below,[70] his general point is sound. Our Constitution was not created all at once. To use an example that does not rely on informal amendments, consider the relevance of the Nineteenth Amendment to the question of whether the Fourteenth Amendment's Equal Protection Clause prohibits most forms of gender discrimination.

One can synthesize the Fourteenth and Nineteenth Amendments by arguing that the two amendments prohibit gender discrimination in any context. The Equal Protection Clause does not set forth particular proscribed bases for government line drawing. Of course, it was adopted in the aftermath of the Civil War and of the former Confederate states' adoption of Black Codes aimed at depriving blacks of the rights of other free persons. Thus, it has long been understood that the Equal Protection Clause proscribes invidious discrimination against blacks, and by extension, against other racial groups.[71] Does the Equal Protection Clause also proscribe gender discrimination? One way to answer this

64. *See* ACKERMAN, *supra* note 13, at 92-104.

65. 198 U.S. 45 (1905).

66. Ackerman refers to the period from the end of the Civil War through (roughly) 1937 as the "middle republic." *See* ACKERMAN, *supra* note 13, at 81-104.

67. *See id.* at 99-104.

68. 381 U.S. 479 (1965).

69. *See* ACKERMAN, *supra* note 13, at 150-58.

70. *See infra* notes 73-95 and accompanying text.

71. *See* Yick Wo v. Hopkins, 118 U.S. 356 (1886).

question would be to analogize gender discrimination to race discrimination.[72] In addition, it would seem appropriate to search for guidance elsewhere in the Constitution. Accordingly, one might take the view that the Nineteenth Amendment's proscription of gender discrimination in voting reflects a constitutional commitment to treating gender-based classifications as presumptively illegitimate in other contexts as well.

On the other hand, one might approach the intergenerational problem by arguing that the Nineteenth Amendment's prohibition on gender discrimination only in voting implies that other forms of gender discrimination are permissible. The maxim *inclusio unius est exclusio alterius* supports this approach. But regardless of *how* one synthesizes the Fourteenth and Nineteenth Amendments, it is clear that one should undertake some effort along these lines to give an interpretation that accounts for the whole Constitution.

Ackerman's recognition of intergenerational issues—like his approach to questions of the generality of the original intent—amounts to a refinement, rather than a repudiation, of originalism. To know how the Constitution bears on a contemporary problem, we must ask what commitments the People have made on the higher law track. Significantly, for Ackerman, as for the strict originalist, the People only act rarely and during discrete periods of time. The goal of constitutional interpretation for both Ackerman and the strict originalist is to preserve the work of the People during periods of normal politics.[73]

To be sure, some of what the strict originalist would deem normal politics—for example, the New Deal—Ackerman classifies as higher lawmaking. Moreover, Ackerman has a more sophisticated view of preservation than does the strict originalist. Yet these differences should not obscure the fact that Ackerman's theory, like strict originalism, is at bottom static, rather than dynamic. Interpreters preserve and synthesize the work of earlier generations. Until the People speak again, however, the Ackermanian interpreter does not permit the Constitution to evolve.[74]

Of course, Ackerman readily admits that with the passage of time new issues arise, so that preservation will require a kind of updating. But a sophisticated originalist will recognize this process as the inevitable effort "to discern how the framers' values, defined in the context of the world they knew, apply to the world we know."[75] For Ackerman, as for the strict originalist, absent a constitutional moment, changed social circumstances do not warrant a new interpretation.

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72. *See* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 135-36 (1994).

73. *See* ACKERMAN, *supra* note 13, at 10 (discussing the "preservationist function" of the Constitution in dualist theory); *id.* at 264 (suggesting that during normal times, the Supreme Court should "represent the *absent* People by forcing our elected politician/statesmen to measure their statutory conclusions against the principles reached by those who have most successfully represented the People in the past").

74. *See id.* at 261-65.

75. Ollman v. Evans, 750 F.2d 970, 995 (D.C. Cir. 1984) (Bork, J.). *See also* William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 694-95 (1976) (accepting that the Constitution can be applied to factual circumstances unforeseen by the Framers).

The third major discrepancy between Ackerman and the strict originalist concerns Ackerman's view of informal amendments. This difference is fundamental. From the strict originalist's perspective, the notion that the Constitution can be amended without complying with the Article V procedures is radically destabilizing. The unwritten, and thus uncertain, character of informal amendments robs the Constitution of its positivist character.

Nonetheless, it is precisely Ackerman's deep philosophical agreement with strict originalism that drives him to posit the concept of informal constitutional amendment. As a matter of substantive constitutional law, Ackerman is a New Deal liberal: he approves of broad protection of individual rights, robust enforcement of equality norms, and an activist state in the economic realm.[76] The simplest way to justify these positions would be to posit some conception of a dynamic Constitution—drawing its meaning from economic, political, and social developments subsequent to the ratification of any given clause. Yet Ackerman does not follow this path. Why not?

For Ackerman to accept a dynamic Constitution, he would have to forego his conception of dualism, which draws a sharp distinction between ordinary lawmaking and higher lawmaking. The kinds of social developments that figure in most dynamic or evolutionary accounts of constitutional interpretation occur quite gradually rather than in discrete periods,[77] and crucially, do not involve the kind of engaged deliberation by the People that Ackerman characterizes as the *sine qua non* of higher lawmaking.

Ackermanian dualism is not itself a feature of strict originalism. Indeed, as noted above, Ackerman critiques strict originalism because it too often fails to distinguish between the Constitution and ordinary legislation. Yet both Ackermanian dualism and strict originalism are firmly rooted in social-contractarianism—

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76. *See generally* BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980).

77. As Frank Michelman has noted, Ackerman's distinction between normal politics and constitutional moments shares a great deal with Thomas Kuhn's distinction between normal science and paradigm shifts. *See* Frank Michelman, *The Republican Civic Tradition: Law's Republic*, 97 YALE L.J. 1493, 1521-23 (1988) (discussing THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970) and arguing that Ackerman's approach recapitulates the flaws of Kuhn's). The theory of constitutional moments also bears a striking resemblance to the evolutionary model of punctuated equilibrium in the natural sciences. According to that model, species remain stable for long periods of time and then evolve rapidly in response to changes in their environment. *See* STEPHEN JAY GOULD, EIGHT LITTLE PIGGIES: REFLECTIONS IN NATURAL HISTORY 277 (1993). Punctuated equilibrium explains an otherwise troubling fact—the absence of intermediate forms in the fossil record. *See id.* (stating that "if species tend to arise in a few thousand years and then persist unchanged for more than a million, we will rarely find evidence for their momentary origin, and our fossil record will only tap the long periods of prosperity and stability"). By contrast, Ackerman's theory of constitutional moments appears to create at least as many puzzles as it solves. For example, once we abandon the requirement of a formal amendment, how do we distinguish constitutional moments from ordinary politics? *See* Michael W. McConnell, *The Forgotten Constitutional Moment*, 11 CONST. COMMENT. 115, 122-40 (1994) (arguing that, according to Ackerman's criteria, the mid-1870s comprise a constitutional moment rejecting Reconstruction's broad goals). Moreover, given the very large number of departures from the original understanding, constitutional moments proliferate to the point where they are so numerous as to overwhelm ordinary politics. *See* Tribe, *supra* note 49, at 1294-1303.

the idea that the Constitution derives its legitimacy from historical acts of consent by the People and must therefore be interpreted in accordance with the discrete expressions of that consent.

Ironically, Ackerman's commitment to social-contractarianism leads him to the uncontractarian concept of informal amendment. To enable open-ended interpretation to coexist with careful preservation of discrete moments of higher lawmaking, Ackerman must view what most of us would call ordinary politics as a form of constitutional amendment. From a theoretical standpoint this might be acceptable if one believed it possible to distinguish between ordinary politics and higher lawmaking. To date, however, Ackerman has failed to provide criteria for drawing this distinction with any precision.[78]

More fundamentally, Ackerman's approach cannot reconcile social contract theory with much of modern constitutional law because social contract theory—as propounded by strict originalists as well as Ackerman—is backward-looking, while much of modern constitutional law is forward-looking. The two landmark cases Ackerman cites to illustrate his interpretive theory, *Brown* and *Griswold*, in fact illustrate the theory's shortcomings.

First, consider Ackerman's explanation of *Brown* as a case of synthesizing the Reconstruction Amendments and the informal amendment accomplished by the New Deal. Ackerman begins by characterizing the Court's opinion in *Plessy v. Ferguson*[79] as resting on a distinction between social classifications and legal classifications as well as on a skepticism about the law's ability to affect social change.[80] Ackerman contends that the New Deal made the social/legal distinction untenable.[81] The informal amendment of the 1930s validated an activist government empowered to right social wrongs and was predicated on the recognition that the law plays a role in creating social wrongs. With institutions like the public school thus transformed "[f]rom constitutional anomaly to constitutional paradigm,"[82] the *Brown* Court, in Ackerman's view, recognized that the badge of inferiority with which segregated public education branded black children was attributable to the law.[83]

Assume that Ackerman's synthetic account demonstrates that the New Deal undermined the rationale given by the *Plessy* Court. Nonetheless, the account hardly proves that *Brown* was correctly decided, especially if we begin with the conventional view that the Framers and Ratifiers of the Fourteenth Amendment understood most forms of de jure racial segregation as consistent with equal protection. The doctrine of separate-but-equal need not rest on a social/legal

78. *See* Sherry, *supra* note 52, at 930 ("Ackerman never suggests any concrete alternative method of demonstrating when the people have in fact signalled their considered judgment, other than the obstacle course established by Article V or perhaps a national referendum . . . .").

79. 163 U.S. 537 (1896).

80. *See* ACKERMAN, *supra* note 13, at 146-47.

81. *See id.*

82. *Id.* at 149.

83. *See id.* at 150.

distinction. It also may be justified by a particular substantive understanding of the concept of equality. W.E.B. DuBois gave expression to such a conception in his essay, *Does the Negro Need Separate Schools?*,[84] and one hears echoes of the position in some cultural feminist defenses of sex-segregated education.[85] The existence of an activist government does not bear on the choice between separatist and integrationist ideals of equality in any obvious fashion.

Moreover, to the extent Ackerman claims that the New Deal rendered the public/private distinction untenable, his synthesis proves too much. The public/private distinction continues to play a critical role in constitutional law.[86] Although one may justifiably criticize particular applications of that distinction,[87] some line must be drawn between harms attributable to the state and harms characterized as private. Seen as an informal constitutional amendment, the New Deal cannot supply concrete line-drawing criteria because the putative informal amendment validated judicial deference to *legislative* and *executive* action. Ackerman wishes to use the New Deal as the social-contractarian warrant for judicially enforceable principles capable of trumping political divisions between public and private. However, Ackerman never confronts the fact that the case which delivers the coup de grace to the *Lochner* era, *West Coast Hotel Co. v. Parrish*,[88] sounds in judicial restraint.[89]

Ackerman uses *Griswold v. Connecticut* as a second illustration of his synthetic approach to interpretation. As Ackerman sees it, the *Griswold* Court faced "a formidable problem. Given New Deal activism, what remained of the Founding values of individual self-determination formerly expressed in the language of property and contract?"[90] The *Griswold* Court solved the problem by substituting heightened judicial protection of intimate association for the *Lochner* era Court's protection of property and contract.[91]

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84. William E. B. DuBois, *Does the Negro Need Separate Schools?*, 4 J. NEGRO EDUC. 328 (1935).

85. *See* Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 84-85 (1995) (describing the litigation challenging the male-only admissions policies of the Citadel and the Virginia Military Institute, in which the defendants presented expert testimony relying upon the work of cultural feminist Carol Gilligan, notwithstanding Gilligan's own objection to what she perceived as a misuse of her work).

86. *See generally* Cass R. Sunstein, Lochner's *Legacy*, 87 COLUM. L. REV. 873 (1987) (noting and criticizing the extent to which modern constitutional law treats so-called private harms as the product of natural, presumably presocial ordering).

87. In my view, existing Supreme Court doctrine overstates the requirement that a state actor possess an illicit motive, thereby ignoring structural harms. *See* DeShaney v. Winnebago County Dep't of Soc. Serv., 489 U.S. 189, 201 (1989) (finding that child abuse was not attributable to the state because the state was merely "aware of the dangers [the plaintiff] faced in the free world"); Milliken v. Bradley, 418 U.S. 717, 744-45 (1974) (holding that federal district court lacked authority to order busing across school district lines because the suburban school districts did not intentionally discriminate on the basis of race).

88. 300 U.S. 379 (1937).

89. *See id.* at 398-99. As I discuss below, *West Coast Hotel* also rests on the lessons the Court drew from the Great Depression. These lessons had very little to do with an informal amendment by the People. *See infra* Part VI.

90. ACKERMAN, *supra* note 13, at 152.

91. *See id.* at 154-56.

Ackerman's account of *Griswold* is not so much wrong as it is incomplete. As Ackerman himself acknowledges,[92] the synthesis adopted by the *Griswold* majority was not the only one available. The *Griswold* dissenters, for example, saw the New Deal as affirming "the grant of an almost plenary power to the activist state."[93] Furthermore, one can readily identify other alternatives. Based on Ackerman's treatment of *Brown*, for example, we might say that the New Deal transformed our constitutional expectations from one involving a night-watchman state to one involving a social-welfare state possessing affirmative obligations. Under this view, there might be no constitutional right to labor for less than the minimum wage and no constitutional right to use contraception, but there would be a constitutional right to employment at a living wage.

Ackerman's theory of intergenerational synthesis is simply too thin to distinguish among these competing conceptions of intergenerational change. In cases such as *Brown* and *Griswold*, Ackerman's theory perhaps shows that the results reached by the Supreme Court, while inconsistent with strict originalism, do not contradict the social-contractarian tenets of constitutional dualism. However, his theory falls short of explaining why the particular solutions adopted in cases such as *Brown* and *Griswold* are correct. To achieve this end would seem to require that the synthetic approach to the social contract be supplemented by other, nonoriginalist interpretive tools.[94] Like Monaghan, Ackerman presents a social-contractarian account of constitutional interpretation, the very structure of which suggests its own incompleteness.[95]

B. FIDELITY AND CHANGE

Before exploring eclectic approaches to constitutional interpretation, we should ask whether we can use Ackerman's theory as a starting point in building a coherent open-ended approach that preserves the chief advances his theory makes over strict originalism. Lawrence Lessig has undertaken the most ambitious—and to my mind, the most successful—attempt along these lines.[96] According to Lessig, Ackerman mistakenly assumes that unless an earlier reading of the Constitution was incorrect, a changed reading will be justified

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92. *See id.* at 157-58.

93. *Id.*

94. In *Griswold*, for example, the Court synthesizes a *textual* commitment to various liberties, a *doctrinal* presumption of noninterference with the political process, and a *normative* conception of the value of intimate association. The *historical* commitments of the People appear to play no significant role, which is not surprising given that the People did not self-consciously place laws governing sexual intimacy and procreation beyond the realm of ordinary politics during a Constitutional moment preceding *Griswold*.

95. Ackerman appears to acknowledge the limitations of his theory as thus far presented. *See* ACKERMAN, *supra* note 13, at 159 ("I hope I have said enough to suggest my larger ambition—to define a model of interpretation which can do justice to the complexity of American judicial practice."). He promises to provide a more complete picture in a later volume. *See id.* at 162.

96. *See* Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395 (1995).

only if there has been an amendment.[97] Lessig posits that preserving the Constitution's meaning from one period to another will sometimes require that a text which was read to say one thing at one time should be read to say something else at a later time. To use one of Lessig's examples, although in the eighteenth century it would have been reasonable (within the meaning of the Fourth Amendment) to detain an arrestee for six hours while transporting him thirty miles on horseback, a six-hour delay for the same purpose would be unreasonable given modern means of transportation.[98] As Lessig explains, fidelity to the original meaning will sometimes require that a court give an unchanged text a changed reading in light of changed circumstances.[99]

According to Lessig, technological advances do not constitute the only way in which an interpretive context may change. Along with Ackerman, he accepts that one must synthesize portions of the Constitution enacted at different times in order to make sense of the entire document.[100] As a general matter, interpretation requires translation when assumptions that were once taken for granted are challenged, or when formerly contested issues become settled. Lessig characterizes such changes as involving "contested" and "uncontested" discourses.[101]

Most of the examples that Lessig provides involve social changes largely external to the law.[102] More controversially, Lessig also argues that a change in the prevailing understandings about the law itself can constitute the kind of changed context that justifies a changed reading.[103] His paradigm is the Supreme Court's changed interpretation of the Rules of Decision Act in *Erie Railroad v. Tompkins*.[104] Lessig argues that the legal realist critique of the view that common-law judges "find" rather than "make" law rendered the old regime of *Swift v. Tyson*[105]—which rested on the premise that state high court common law decisions "are, at most, only evidence of what the laws are; and are not of themselves laws"[106]—increasingly untenable.[107]

Although *Erie* involved a changed reading of a statute, Lessig applies his theory of the "*Erie* effect" to changes in constitutional readings as well. With the success of legal realism and related movements, the legal community increasingly viewed interpretive activities that were formerly assumed to be

97. *See id.* at 400.

98. *See id.* at 397-98.

99. *See id.* at 402-03.

100. *See id.* at 407-10.

101. *See id.* at 410-14.

102. *See id.* at 415-19 (discussing moral and scientific attitudes towards homosexuality); *id.* at 419-23 (discussing economic theory); *id.* at 423-26 (discussing social and scientific attitudes towards race).

103. *See id.* at 426-37.

104. 304 U.S. 64 (1938).

105. 41 U.S. (16 Pet.) 1 (1842).

106. *Id.* at 18.

107. *See* Lessig, *supra* note 96, at 426-32. In my view, Lessig overstates the role of legal realism in the *Erie* decision. *See* Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651, 707-09 (1995) (arguing that federalism provides a better account of *Erie*).

legal and objective as political and subjective. The courts responded by allocating decisionmaking authority to politically accountable institutions.[108] The repudiation of *Lochner* provides the classic example of such an allocation.[109] In Lessig's view, the change in the prevailing understanding justified the changed readings because "the author [of the legal texts under construction] did not choose or argue over or resolve any conflicts about matters within an uncontested discourse."[110]

Notice that Lessig, like Ackerman, defends his view of an evolving Constitution in starkly intentionalist terms. Change is permissible, but only because it preserves the translated intentions of the authors. In dispensing with the *deus ex machina* of informal constitutional amendments, Lessig's theory seems more conventional than Ackerman's. But in placing fidelity at the center of a dynamic model, Lessig's theory also encounters two important difficulties.

First, the *Erie* effect can be problematic on its own terms. The idea that the shift from an uncontested discourse to a contested one (or to a different contested discourse) authorizes the modern interpreter to depart from the original reading will sometimes provide a license to ignore the text rather than to interpret it. Consider an example Laurence Tribe and I have given:

> [C]ontrary to legal realist theory, the Fifth Amendment's Takings Clause presupposes that property can be prepolitical .... If, as the legal realists argued, property were *only* the sum total of legislative entitlements, then it could never be "taken" because, by definition, that which the legislature declares no longer to be yours would not qualify as private property in the first place.[111]

How would the Takings Clause fare under Lessig's approach? If we accept that the Takings Clause assumes a prepolitical conception of property that is now contested (or worse, completely rejected) by legal realism, the *Erie* effect allows courts to ignore the Takings Clause without contradicting the intent of its authors. Yet this seems to go too far. Surely the Takings Clause has *some* effect. Modern conditions may lead us to take a different approach to some problems from that of the Founding generation, but that is very different from saying that modern conditions justify ignoring the text completely.[112]

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108. *See* Lessig, *supra* note 96, at 438.

109. *See id.* at 443-72.

110. *Id.* at 440.

111. TRIBE & DORF, *supra* note 26, at 70. Of course, well before legal realism, jurists held a positivist view of the particular property rules in any jurisdiction. *See* Christopher L. Eisgruber, Dred *Again: Originalism's Forgotten Past*, 10 CONST. COMMENT. 37, 44 (1993) (describing the views of Joseph Story).

112. The Takings Clause was originally understood to apply to appropriations but not to regulations. *See* William M. Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 782 (1995). Lessig admires Treanor's history and approves in principle of his efforts to translate that history, *see* Lawrence Lessig, *Reading the Constitution in Cyberspace*, 45 EMORY L.J. 869, 902 n.93 (1996), but questions whether the translation can be rendered sufficiently

The second difficulty with Lessig's approach is external. Like Ackerman's theory of intergenerational synthesis, Lessig's fidelity theory fails to account for much of modern constitutional law. Lessig illustrates how his approach works by considering the Supreme Court's acquiescence to the New Deal during the 1930s.[113] Significantly, the shift Lessig describes is a judicial retreat. By the beginning of the 1940s, the Court had abandoned its restrictive interpretation of the Commerce Clause and its expansive interpretation of property and of liberty of contract under the Due Process Clauses.[114] In Lessig's account, the Court's earlier assumptions had become part of a contested discourse, and thus deference to the political branches constituted an appropriate response. But Lessig's theory does not provide an explanation for the Court's continued active role in reviewing legislation that infringes upon various individual rights.

Perhaps this is deliberate. Perhaps Lessig believes that the Court's modern jurisprudence of unenumerated rights cannot be justified in terms of fidelity and is therefore illegitimate. But this answer will not suffice because we now have a contested discourse about enumerated rights as well as unenumerated ones. The right not to have property taken without just compensation is one such right. The right to racist speech is another.[115] Lessig's theory would apparently authorize deference to elected bodies even in these areas. Lessig's powerful explanation of deference to elected bodies is only part of the story of modern constitutional law. To account for the remainder would require that fidelity theory be supplemented with other interpretive principles.[116]

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nonpolitical to justify judicial action. *See* Lawrence Lessig, *Fidelity and Constraint*, 65 FORDHAM L. REV. 1365, 1383-84 (1997). A more conventional approach would search for core values protected by the Takings Clause that continue to warrant protection in the modern age. *See, e.g.*, William K. Jones, *Confiscation: A Rationale of the Law of Takings*, 24 HOFSTRA L. REV. 1, 4-5 (1995) (identifying alleviation of property owners' insecurity, promotion of private investment, and encouragement of government fiscal responsibility as purposes of the Takings Clause).

113. *See* Lessig, *supra* note 96, at 443-72.

114. *See, e.g.*, United States v. Darby, 312 U.S. 100, 125 (1941) (sustaining Congress's power under the Commerce Clause to establish minimum wages, maximum hours, and overtime compensation rules for workers producing goods for interstate commerce); United States v. Carolene Prods. Co., 304 U.S. 144, 148 (1938) (discussing the presumption of constitutionality of economic legislation challenged under the Due Process Clauses of the Fifth and Fourteenth Amendments).

115. *Compare* R.A.V. v. City of St. Paul., 505 U.S. 377, 382-90 (1992) (holding that municipality may not prohibit a discriminatory subset of otherwise proscribable fighting words) *with id.* at 397-411 (White, J., joined by Blackmun, O'Connor, & Stevens (in part), concurring in the judgment) (contesting the majority's principal argument). *See generally* Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431 (arguing that the distinction between hate speech and fighting words is false).

116. Lessig has recently advanced a translation-based theory that would distinguish between rights provisions and other provisions. He argues that in structural cases such as *Erie* (which involves the structural principle of federalism), the default setting is state power, so that a shift to a contested discourse leads to deference to such power. By contrast, because rights function as trumps, the government must advance a reason to override a right, so the default position favors the individual; thus, a shift to a contested discourse will displace government power. *See* Lessig, *supra* note 112, at 1414. This suggestion seems too clever by half. In rights cases, the default is set against government power only after a right is found. Yet in the most controversial cases, the very question is whether there is a right. Unless there is a general right to liberty (which, constitutionally speaking, there is not),

Ultimately, Lessig fails to account for much of modern constitutional law in terms of fidelity for the simple reason that much modern constitutional law is not faithful to the intent of the Framers. The most that Lessig can do is show that some modern constitutional decisions do not contradict a suitably translated version of the Framers' intentions. He cannot show, however, that the decisions derive from those intentions.

Although both Ackerman and Lessig present sophisticated refinements of originalism, neither provides a satisfactory explanation of modern constitutional law.[117] This is hardly surprising because modern constitutional law is only partly based on the sorts of social-contractarian premises from which both Ackerman and Lessig begin.[118]

IV. ECLECTICISM

The theories examined thus far raise but do not answer the question of how to justify the nonoriginalist interpretive techniques that play a major role in modern constitutional interpretation. In answering this question, perhaps one might construct a theory based on multiple sources of legitimacy—along the lines suggested by Monaghan. Because multiple sources will sometimes give rise to conflicting and incommensurate arguments, such an eclectic theory would appear to require some metaprinciple that mediates among conflicts between different kinds of arguments.[119]

Anyone familiar with the workings of constitutional law as practiced by the Supreme Court will recognize an immediate difficulty in locating a suitable metaprinciple: Depending on the context, the Court will sometimes favor one form of argument, but at other times favor others. As a consequence, any metaprinciple likely will be descriptively inaccurate. Putting the matter somewhat differently, adherence to any *a priori* sensible metaprinciple will require the overruling of a good deal of existing case law. Largely for this reason, a number of important constitutional scholars such as Laurence Tribe characterize the quest for a metaprinciple as a vain one.[120]

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the mere assertion of a constitutional right should not alter the default. Discerning whether a right exists in the first place would still seem to require a thicker normative theory than Lessig provides.

117. I do not contend that it is logically impossible to construct a descriptively accurate account of constitutional law that begins from modified contractarian premises. For an example of another interesting effort along these lines, see Jed Rubenfeld, *Reading the Constitution as Spoken*, 104 YALE L.J. 1119, 1143-63 (1995) (substituting the idea of a commitment over an extended period of time for that of consent at a particular moment).

118. *See* Monaghan, *supra* note 10, at 727-39 (arguing that in the areas of civil liberties, equal protection, federalism, separation of powers, and the scope of presidential power, the Court has either initiated or acquiesced in broad departures from the original understanding).

119. *See, e.g.*, Fallon, *supra* note 16 (arguing that the apparent incommensurability of different forms of constitutional argument can often be overcome by the interpreter's recognition that the forms often overlap and proposing a hierarchy of text over Framers' intent, over constitutional theory, over precedent, over value, for those cases in which conflict is unavoidable).

120. Tribe organizes his account of constitutional law into seven models, each corresponding in part

A. THE RESORT TO DESCRIPTION

Going beyond the claim that no metaprinciple will work in practice, Philip Bobbitt argues that the quest for a metaprinciple—or, as he calls it, an algorithm—is ill-conceived on more basic grounds. According to Bobbitt, the search for a constitutional decisionmaking algorithm rests on the false assumption that constitutional law needs to be legitimated by reference to an external standard. Instead, he argues, use of the various forms of constitutional argument—*modalities* in Bobbitt's terminology—maintains the legitimacy of the constitutional system.[121] Bobbitt identifies textual, doctrinal, historical, ethical, and prudential arguments as distinct modalities.[122] Any algorithm will either elevate one of the modalities above the others or create a new metamodality, and in either case we will be left with the question of what legitimates *that* choice.[123] The efforts at external legitimation result in either an infinite regress or in circular argument. Bobbitt would have us recognize that within constitutional law there is no way to legitimate the modalities.

Bobbitt's account of constitutional law is subtle and insightful. As a matter of description, his typology[124] provides a useful tool for analyzing constitutional questions.[125] But does it do more? Bobbitt would answer that this question is

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to an historical era, but each also present to some degree today. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 1-1, at 1-2 (2d ed. 1988). He states: "How much can be gained by seeking *any* single, unitary theory for construing the Constitution is unclear. It may be that all efforts at such reduction or simplification, however suggestive, are ultimately more misleading than informative." *Id.* at 1. *See also* Laurence H. Tribe, *Comment* in SCALIA, *supra* note 2, at 73 (declining the invitation to "roll [his] legal universe into a ball and toss it into the ring as [a] candidate for what the final rules of the interpretive game must be").

Fallon refers to Tribe and Stanley Fish as "open-system" theorists because they eschew "claims that there are generally applicable rules or even articulable principles for weighing or combining constitutional arguments of different kinds." Fallon, *supra* note 16, at 1224. In this respect, Tribe and Fish make the same point as Philip Bobbitt, whose work I discuss below, even though Bobbitt distinguishes his position from Fish's. *See* BOBBITT, *supra* note 15, at 38-42. Curiously, something about Stanley Fish's views inspires other scholars to assert that at an important level he really agrees with his disputants. *See generally* Dennis Patterson, *The Poverty of Interpretive Universalism: Toward the Reconstruction of Legal Theory*, 72 TEX. L. REV. 1, 2-7 (1993) (arguing that Fish and Ronald Dworkin share the view that meaning consists of the application of an interpretive framework); Stanley Fish, *How Come You Do Me Like You Do? A Response to Dennis Patterson*, 72 TEX. L. REV. 57 (1993) (arguing that Patterson has misread his work); Dennis Patterson, *You Made Me Do It: My Reply to Stanley Fish*, 72 TEX. L. REV. 67 (1993) (arguing that Fisb has misunderstood his own thought).

121. *See* BOBBITT, *supra* note 15, at 8-9.

122. *See id.* at 11-22.

123. *See id.* at 131-54.

124. Bobbitt first set forth the typology in Philip Bobbitt, *Constitutional Fate*, 58 TEX. L. REV. 695 (1980). Other scholars classify the forms of constitutional argument somewhat differently. *See* CHARLES A. MILLER, THE SUPREME COURT AND THE USES OF HISTORY 15-28 (1969) (discussing text, doctrine, precedent, social evidence, and history); Fallon, *supra* note 16; Griffin, *supra* note 14, at 1762-67 (comparing Bobbitt's typology with those of Robert Post and Richard Fallon and discussing Robert Post, *Theories of Constitutional Interpretation*, 30 REPRESENTATIONS 13 (1990)).

125. For example, in the middle Section of *Constitutional Interpretation*, Bobbitt uses the modalities to shed considerable ligbt on a judicial opinion, (Missouri v. Holland, 252 U.S. 346 (1920)), an executive branch scandal, (the Iran-Contra affair), and a Senate decision (the rejection of President Reagan's nomination of Robert Bork for the Supreme Court). *See* BOBBITT, *supra* note 15, at 45-108.

misguided.[126] Exhibiting Wittgenstein's emphasis on practice,[127] he states that "[l]aw is something we do, not something we have as a consequence of something we do."[128] He rejects "an external legitimating criterion for law"[129] and sees his work as shifting from the subject of truth to that of meaning.[130] In prosaic terms, Bobbitt views jurisprudence as properly focusing on description rather than justification.

Bobbitt's approach eliminates the gap between normative and descriptive accounts of constitutional law by simply denying the utility of a normative account.[131] This is not to say that normative arguments play no role in Bobbitt's descriptive project. Indeed, Bobbitt devotes much of his first major work, *Constitutional Fate*,[132] to showing that "ethical argument"—by which he means arguments rooted in the American ethos of limited government—constitutes a modality of our existing constitutional discourse.[133] Bobbitt's approach is antinormative in the sense that he disapproves of claims that constitutional interpretation *ought* to proceed in one fashion or another.

Bobbitt's refusal to provide an account that justifies constitutional interpretation renders his descriptive account inaccurate for the following reason: the process of justification is itself internal to constitutional interpretation. Justifica-

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126. *Accord* Griffin, *supra* note 14, at 1766 ("What theory could possibly provide a persuasive and coherent rationale for the entire body of American constitutional law as well as provide persuasive guidance for all future cases?").

127. *See* George A. Martinez, *The New Wittgensteinians and the End of Jurisprudence*, 29 LOY. L.A. L. REV. 545, 548-56 (1996) (describing Bobbitt as the leading neo-Wittgensteinian legal scholar).

128. *See* BOBBITT, *supra* note 15, at 24.

129. Philip Bobbitt, *Reflections Inspired by My Critics*, 72 TEX. L. REV. 1869, 1886 (1994).

130. *See id.* at 1885. The question of whether this is an appropriate approacb to jurisprudence has inspired some heated, indeed sometimes nasty, debate. For the most spirited attacks, see generally Mark Tushnet, *Justification in Constitutional Adjudication: A Comment on Constitutional Interpretation*, 72 TEX. L. REV. 1707 (1994); Steven L. Winter, *The Constitution of Conscience*, 72 TEX. L. REV. 1805 (1994). For the most spirited defense, see generally Dennis Patterson, *Wittgenstein and Constitutional Theory*, 72 TEX. L. REV. 1837 (1994) (critiquing Winter). For the next round, see Bobbitt, *supra* note 129, at 1904-10, 1940-61 (responding to Winter); Steven L. Winter, *One Size Fits All*, 72 TEX. L. REV. 1857 (1994) (responding to Patterson).

131. Of course Bobbitt accepts that constitutional theory must be normative in the sense that it must account for law's force, and its insistence on legal norms. *See* BOBBITT, *supra* note 15, at 39-40. Bobbitt rejects accounts that are normative as opposed to descriptive. *Cf.* Bobbitt, *supra* note 129, at 1908-09 (discussing "normative" critiques in this second sense).

132. *See* PHILIP BOBBIT, CONSTITUTIONAL FATE 93-167 (1982).

133. In this respect, Bobbitt's approach resembles what Ronald Dworkin terms the "moral reading of the Constitution." *See* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION I-38 (1996). For Dworkin, as for Bobbitt, moral arguments play a role, but not necessarily the dominant role, in constitutional interpretation. Moral principles must fit with "language, precedent, and practice[,]" although in hard cases "thoughtful judges must . . . decide on their own whicb conception does most credit to the nation." Ronald Dworkin, *The Moral Reading of the Constitution*, N.Y. REV. OF BOOKS, Mar. 21, 1996, at 46, 48. Bobbitt would give somewhat less scope to moral argument as such, distinguishing between moral arguments generally—which Bobbitt deems prudential—and "ethical arguments"—which Bobbitt sees as more closely tied to the Constitution. *See* BOBBITT, *supra* note 15, at 138. I discuss the relation between Bobbitt's modalities and Dworkin's account of integrity in Michael C. Dorf, *Truth, Justice, and the American Constitution*, 97 COLUM. L. REV. 133, 147-52 (1997).

tion may not be a modality in the sense in which Bobbitt uses the term, but Supreme Court opinions abound with self-conscious justifications of the modalities the Court employs.[134] To describe constitutional law accurately thus requires an account of justification.

Nevertheless, Bobbitt provides an interesting and sophisticated argument in support of his claim that accounts which seek to justify constitutional interpretation are fundamentally misguided. To understand the argument's limitations requires that we engage it in some detail, however. To that end, consider how Bobbitt might respond to critiques of his arguments based on various social-contractarian premises.

From the perspective of the strict originalist, Bobbitt's rejection of an external source of legitimacy will appear unconvincing. Bobbitt argues that all quests for external sources of legitimacy either privilege a single modality or create a new one, which must itself then be legitimated.[135] The strict originalist will likely agree as a descriptive matter—strict originalism does privilege the historical modality—but will not see this as a flaw in her theory. The strict originalist will say that it is no answer to the charge that modern departure from original meaning debases constitutional law to respond—as Bobbitt apparently does—by saying that this is simply the way things are. So much the worse for the present, the strict originalist will say.

Alternatively, the originalist might respond to Bobbitt's resort to description by arguing that, contrary to Bobbitt's claim otherwise, Bobbitt himself endorses a metaprinciple: the one that says correct use[136] of the existing modalities renders constitutional argument legitimate. To be sure, this view does not qualify as a metarule in the sense that Bobbitt uses the term; it does not attempt to resolve intermodal conflict. But it qualifies as a metarule in the sense that it is Bobbitt's reason for believing that correct use of the modalities is the touchstone of legitimate constitutional argument.

Moreover, the strict originalist will keep pushing. "*Why* are the existing modalities the right way to go about making legitimate constitutional arguments?" we can hear her ask. Again, Bobbitt denies the coherence of the question. From his perspective, the question makes as little sense as asking why the rules of English require that plural nouns take plural verbs. Those are simply

134. Indeed, in important cases, the legitimacy of the Court's decision is typically the *central* issue. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 865-69 (1992) (discussing the Court's legitimacy and stare decisis); Bowers v. Hardwick, 478 U.S. 186, 194 (1986) (discussing the legitimacy of judicial discovery of unenumerated constitutional rights); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176-78 (1803) (discussing the legitimacy of judicial review).

135. *See* BOBBITT, *supra* note 15, at 122-40, 155-56.

136. By "correct use" I mean what Bobbitt means, namely arguments within the boundaries of acceptability regardless of the particular result at which they arrive. *See id.* at 177. To use an analogy proposed by Bobbitt and developed by Jack Balkin and Sanford Levinson, an argument correctly using the modalities is legitimate, regardless of the result urged, in the way that a sentence is grammatical, regardless of the meaning of the sentence. *See* J.M. Balkin & Sanford Levinson, *Constitutional Grammar*, 72 TEX. L. REV. 1771, 1775 (1994).

the rules of the game; if you do not abide by them, you are playing a different game.

At this point the strict originalist may become exasperated. She will argue that Bobbitt is being pedantic. The originalist could invoke the following analogy: When baseball's American League adopted the designated-hitter rule, it changed the rules of the game. However, only an extreme purist would say that it abolished baseball. Just as fans of the game of baseball may profitably debate whether the change improved the game, so constitutional scholars, judges, lawyers, and others may sensibly argue over whether constitutional law would be improved if strict originalism were to replace the multiple modalities.

In the end, Bobbitt acknowledges this challenge. He admits that if it could be shown that the existing system could be made more just, that showing would count as a convincing argument for reform.[137] But Bobbitt includes an important caveat: the burden of proof lies with those who would change the existing system, and that burden requires more than merely hypothesizing some more just ideal system. The burden of proof requires making concrete the transition from here to there in the actual world.[138] Bobbitt goes on to argue that neither originalism nor any other proposed single-modality interpretive method would make the system more just.[139]

Bobbitt thus appears to give two very different answers to the originalist critic. On the one hand, he tells the originalist that her views about legitimacy are simply mistaken as a matter of understanding the nature of constitutional argument. On the other hand, Bobbitt seems to accept the possibility that the system could change, but counters that the change would not be an improvement. Bobbitt thus makes both an *a priori* claim that constitutional law cannot be originalist and a consequentialist claim that (even if it could be) it should not be originalist.

Given that Bobbitt understands how to defeat the originalist objection in consequentialist terms, how can he also maintain that the objection is ill-formed? As I read Bobbitt, the originalist objection is not really *a priori* incomprehensible; rather, it is such an extreme version of a comprehensible objection that it becomes incomprehensible. Return to the baseball analogy. As noted, one could debate whether adding a designated hitter, or permitting night games at Wrigley Field in Chicago, changed the game for better or for worse, while still understanding that with or without either change, the game played still would be baseball. But if someone were to propose that baseball would be "improved" if it were replaced by soccer, we would say that the change is so radical that it no longer makes sense to talk of the resulting game as baseball.[140] Similarly, I read Bobbitt to say that all single-modality theories of constitutional

137. *See* BOBBITT, *supra* note 15, at 170.
138. *See id.* at 170, 176-77.
139. *See id.* at 171-86.
140. *Cf.* TRIBE & DORF, *supra* note 26, at 112-14 (discussing essential aspects of judicial decisions).

law depart so far from what the relevant audience understands that subject to be that they cannot meaningfully be called theories of constitutional law.

The response Bobbitt would give to the strict originalist's critique may be convincing on its own terms, but it does not adequately address more subtle critiques, as we can see by contrasting Bobbitt's views with Monaghan's. Monaghan begins with the premise that constitutional law derives its legitimacy from the account of popular sovereignty given by strict originalism. Pragmatic considerations lead him to conclude that another factor—the stability that comes from respecting important precedents—also bestows legitimacy on our constitutional order.[141] Notice that Monaghan does not content himself with *describing* the role stare decisis plays in constitutional adjudication; he seeks to justify that role. Having done so, he ends with a question: might other instrumental modes of interpretation also bestow legitimacy on the constitutional order, and if so, how so? For Bobbitt, by contrast, reliance on stare decisis (or, as he would call it, reasoning in the doctrinal modality) does not need to be legitimated. Recognizing that precedential argument is a modality disclaims a need for external legitimation.

Monaghan's ultimate question points out the limitations of Bobbitt's approach, as we can see by translating the question into Bobbitt's own vocabulary. Monaghan asks how we can justify the particular modalities currently employed by constitutional interpreters. Recall that Bobbitt gives two answers. First, he argues that this question misconceives the nature of modal reasoning. Second, he suggests that the existing modalities enable justice. As we shall see, neither answer adequately addresses the question.

First, as the baseball example illustrates, Bobbitt's analytical claim only disposes of conceptions so radically divergent from existing constitutional practice that they cannot be taken seriously as conceptions of that practice. Bobbitt primarily targets single-modality theories.[142] Yet Monaghan does not seek a justification for a single-modality theory. Quite to the contrary, he seeks to justify an account of constitutional law that allows for text, original meaning, precedent, morality, and perhaps other modes of interpretation. Moreover, Monaghan does not suggest that each of these modalities must be justified by reference to a single overarching modality (or algorithm). Like Bobbitt, Monaghan is eclectic, but unlike Bobbitt, he feels some need to explain why the particular modalities we use are the right ones.[143]

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141. *See* Monaghan, *supra* note 10, at 724.

142. *See* BOBBITT, *supra* note 15, at 126-40 (criticizing Mark Tushnet's approach, which Bobbitt deems prudentialist).

143. I am somewhat reluctant to say that Bobbitt feels no need to justify the particular extant modalities. In first introducing his typology, Bobbitt gave a brief explanation of how each modality attains legitimacy. *See* Bobbitt, *supra* note 124, at 700-25. By contrast, *Constitutional Interpretation* describes how each modality functions but studiously avoids explaining why each might be considered legitimate. *See* BOBBITT, *supra* note 15, at 13-22. Indeed, Bobbitt argues in *Constitutional Interpretation* that a modality can only be justified in a circular manner. *See id.* at 25-27. I take the position stated in *Constitutional Interpretation* to express Bobbitt's considered view.

Bobbitt's second argument against the need for justification also fails to dispose of Monaghan's question. Bobbitt argues that the very incommensurability of the modalities—the fact that they do not invariably produce a unique decision—enables justice because the indeterminacy enables the exercise of conscience by the judge.[144] This is a bold and original suggestion, but it does not dispatch all approaches that seek instrumental justifications of the modalities actually used by courts. Bobbitt's argument merely shows that indeterminacy of some sort enables the exercise of judicial conscience. But there are many ways in which a decisionmaking system can be indeterminate. Why should we be happy with the particular kind of indeterminacy produced by the existing modalities? The question matters because modalities that operate differently from the way in which the existing ones operate will enable judicial conscience in a different way.

Accepting Bobbitt's view that no single algorithm exists only tells us that we should not look for a single unifying justification for the modalities. It does not tell us that we should not look for justifications of each of the modalities. Consider the following illustration. Suppose that the most accurate account of the Supreme Court's practice led to the conclusion that the prudential modality is a mode of reasoning in which one seeks rules of law to maximize the welfare of white Protestant males. In such a world, Bobbitt could make all of the same arguments that he makes in our world.[145] What might he say to a critic who charged that this prudential principle is substantively unjust because it facilitates the exercise of judicial conscience in a pernicious direction? *That the critic mistakenly seeks a single-modality explanation?* This is not true; she merely claims that one of the modalities should be altered. *That the existing modalities enable conscience?* But the critic will propose alternative modalities that also facilitate conscience, and a more just version of conscience at that.

Bobbitt rightly identifies the eclectic character of constitutional interpretation. But his account of constitutional law is incomplete. A shift from a single-modality account implies a shift from a single source of legitimacy to multiple sources of legitimacy. It does not guarantee that the existing eclectic order, whatever its content, is legitimate.

To be convincing, Bobbitt's constitutionalism seems to require precisely what

144. *See* BOBBITT, *supra* note 15, at 178-86. Insofar as conscience is personal, this answer will not satisfy the originalist, who typically subscribes to originalism precisely as a means of avoiding decisions according to individual (unelected) consciences. *See* Antonin Scalia, *Originalism: The Lesser Evil,* 57 U. CIN. L. REV. 849, 854 (1989). Indeed, even nonoriginalists may be troubled by Bobbitt's reliance on personal moral sensibilities. *See* DENNIS PATTERSON, LAW AND TRUTH 143-49 (1996). Yet viewed in a different light, conscience is not necessarily idiosyncratic. As Jefferson Powell notes, Bobbitt's work implicitly suggests that the very practice of using the modalities skillfully will mold the decisionmaker's conscience. *See* H. Jefferson Powell, *Constitutional Investigations*, 72 TEX. L. REV. 1731, 1749-50 (1994).

145. Indeed, some have argued that this *is* our world. *See, e.g.*, Martinez, *supra* note 127, at 568-69 (stating that Bobbitt's approach does not address "the problem of bad coherence"); Margaret J. Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1710 (1990) (observing that legal systems may be both coherent and sexist or racist).

he rejects: some justification for each of the particular modalities and some account of how the modalities interact.[146] Without such a justification, his description is, in the end, only a description. It closes the descriptive/normative gap by fiat.

B. THE PERILS OF ECLECTICISM

Eclectics believe that constitutional interpretation derives its legitimacy from a variety of sources. Our constitutional practices require interpreters to look to text, structure, history, precedent, and morality. What does the judge do when these sources point in conflicting directions? According to Bobbitt, she resorts to conscience.[147] For those who find this answer unacceptable, eclecticism appears to pose an incommensurability problem.

Consider one approach to the incommensurability dilemma. Richard Fallon argues that most cases raise no issue of incommensurability, because the forms of constitutional argument are interrelated.[148] For example, arguments about precedent incorporate earlier arguments about text, structure, history, and morality. Similarly, moral arguments take other forms of argument as starting points. In short, the most effective constitutional arguments use the various forms to generate a complete overall picture. The typology of constitutional argument is useful in the way that studying various body parts is useful: One may profitably study the liver, the pancreas, the heart, and the brain as independent entities, but in the end, none can function except as part of the whole organism.[149]

Nevertheless, sometimes irreducible conflict among different forms of argument will exist. Fallon proposes a hierarchy for such situations. In descending order of priority come arguments from: (1) text, (2) historical intent, (3) theory, (4) precedent, and (5) value.[150] In my view, the hierarchy cannot succeed because there inevitably will be cases in which an argument on a lower rung legitimately trumps one on a higher rung. But unlike Bobbitt, I do not believe that the impossibility of a hierarchy justifies a self-conscious resort to the private mechanism of conscience.

As Jack Balkin and Sanford Levinson have noted, intermodal conflict is no more inherently troubling than intramodal conflict.[151] Nor does it present a greater incommensurability problem. For example, within the prudential modal-

146. As Mark Tushnet observes, despite Bobbitt's occasional insistence that each constitutional decision employs one or another modality depending on the context, Bobbitt elsewhere seemingly approves of the simultaneous use of multiple modalities. *See* Tushnet, *supra* note 130, at 1725 n.106 (1994).

147. *See* BOBBITT, *supra* note 15, at 178-86.

148. *See* Fallon, *supra* note 16, at 1237-42.

149. *Cf.* Martin H. Redish, *Judicial Review and Constitutional Ethics*, 82 MICH. L. REV. 665, 668 (1984) (reviewing PHILIP BOBBITT, CONSTITUTIONAL FATE (1982), and contending that Bobbitt artificially distinguishes the modalities).

150. *See* Fallon, *supra* note 16, at 1244-46.

151. *See* Balkin & Levinson, *supra* note 136, at 1796-1801 (arguing that Bobbitt does not provide an adequate account of intramodal conflict).

ity, judges must typically weigh incommensurate costs and benefits. Within the historical modality, we sometimes find that Hamilton thought one thing and Madison thought something else. Yet we do not ordinarily believe that such circumstances require us to choose an all-purpose approach to moral questions or to establish general criteria for preferring one Framer over another. Neither legal reasoning in general nor constitutional law in particular works in this way. Instead, judges make concrete, contextualized judgments.[152] To be sure, they try to do so in a principled way. But surely Bobbitt is correct that the search for a single, over-arching principle of interpretation is misguided. Thus, incommensurability does not constitute a fatal flaw of eclecticism.

Nevertheless, a different kind of inconsistency plagues eclecticism. Although the various mechanisms each modality uses for producing meaning can usually be harmonized, the conventional justification for relying on original meaning appears inconsistent with the justification for the others. The social-contractarian claim that adherence to the intent of the Adopters confers legitimacy is also a claim that deviation from the Adopters' intent destroys legitimacy.

To be sure, if one takes the view that nonoriginalist sources only become relevant to constitutional interpretation when original meaning leaves ambiguity,[153] then no conflict exists. Under such a view, value arguments play only a gap-filling role necessitated by originalism's limitations. But nonoriginalist sources appear to play a larger role in constitutional jurisprudence as well as eclectic constitutional theory—sometimes trumping a relatively clear original understanding.[154] The indeterminacy of originalism cannot account descriptively for this feature of the existing constitutional order.

If we seek a justification for each of the modalities, we must squarely confront the challenge of originalism. Strict originalism is incompatible with eclecticism (and thus with the modern constitutional order) because the strict originalist denies the legitimacy of nonoriginalist arguments.

A less strict form of originalism may at first appear to fare better, but here too problems emerge. What does it mean to say that other factors *outweigh* even a clearly contrary original understanding? No doubt it means that, all things considered, giving greater weight to the nonoriginalist sources will advance important constitutional values to a greater extent than would permitting the original understanding to prevail. But if such consequentialist determinations can *ever* trump original understanding, why should they not *always* trump original understanding?

Thus, we have come full circle from Monaghan's puzzle. For Monaghan, the need for a consequentialist account of stare decisis opens the door to other, nonoriginalist sources. If we accept the legitimacy of these other sources in

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152. *See* Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 746-48 (1993).

153. This appears to be Brest's definition of moderate originalism. *See* Brest, *supra* note 1, at 229.

154. *See* DWORKIN, *supra* note 133, *passim* (arguing that American constitutionalism includes a thorough and longstanding commitment to treating constitutional provisions as moral principles that often contravene the Framers' concrete expectations).

consequentialist terms, however, why should we give original meaning any weight at all? In an eclectic world, the social-contractarian pedigree of original meaning does not enable it to ride for free. Like the other sources of constitutional meaning, it too must be justified in consequentialist terms.[155] I now turn to the question of whether this can be done without undermining the legitimacy of other, nonoriginalist forms of constitutional argument.[156]

V. TEXT, CONTEXT, AND ORIGINAL MEANING

The question of *why* the Constitution, largely written by generations long dead, should bind us today, is a hotly contested question of political theory. Originalists propose one answer: The Constitution binds us because it was adopted by the People. In the introduction, I proposed a different answer: The Constitution binds us because the overwhelming proportion of the population accepts that it does.[157] One can readily imagine other answers. Following Edmund Burke, for example, we might locate the Constitution's authority in a view about the organic nature of society over time.[158] Or we might suppose that the Constitution binds us because it embodies substantively just principles.[159] But whatever disagreement exists over the source of the Constitution's status as law, little disagreement exists over the *fact* that it is law. And whatever disagreement exists over what comprises "the Constitution," very little disagree-

155. One can readily anticipate Bobbitt's objection that by seeking an instrumental justification of the various modalities, we elevate the prudential modality above all others. Indeed, he levels this very charge at Mark Tushnet. *See* BOBBITT, *supra* note 15, at 126-40 (discussing MARK TUSHNET, RED, WHITE AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW (1988)). As noted above, Bobbitt's stance overlooks the important role that justificatory arguments play *within* constitutional law.

156. The conventional justifications for the other, nonoriginalist, modalities might be inconsistent with one another as well. For example, textualism could be justified in terms of original intent, *see* Brest, *supra* note 1, at 208-09, or in terms of the value served by allowing the public to know the law. *See* BOBBITT, *supra* note 15, at 25-27. Either justification could be seen as inconsistent with one conventional justification for normative argument in constitutional interpretation—namely, to make the Constitution cohere with the fundamental values of our society. *See, e.g.*, *id.* at 20 (describing the ethical modality as expressing the American ethos of limited government); DWORKIN, *supra* note 133, at 285 (describing the courts' obligation to "try to discover principles justifying not only the text of the Constitution but the traditions and practices . . . that are also part of our constitutional record" as the central idea of "a jurisprudence of principle"). To the extent that such values evolve, they depart from the original understanding and to the extent that normative argument is indeterminate, it sacrifices textualism's commitment to clarity.

I recognize that a complete account of constitutional interpretation would have to harmonize the justifications for the nonoriginalist modalities with one another in the same way that Parts IV and V attempt to harmonize originalist and nonoriginalist modalities. The broader project is beyond the scope of this article; I believe that such a harmonization is possible, although I do not defend that belief here.

157. *See supra* note 28 and accompanying text.

158. *See* Thomas W. Merrill, *Bork v. Burke*, 19 HARV. J.L. & PUB. POL'Y 509, 509-10, 523 (1996) (arguing that judicial "conventionalism" serves conservative values better than originalism). *But see* ACKERMAN, *supra* note 13, at 17-24 (arguing that Burkeanism undervalues the role of higher lawmaking in dualist democracy).

159. *See, e.g.*, Christopher L. Eisgruber, *Justice and the Text: Rethinking the Constitutional Relation Between Principle and Prudence*, 43 DUKE L.J. 1, 2 (1993) (tracing "constitutional authority to the substantive goodness of constitutional norms, rather than to the process that created them").

ment exists with the proposition that the answer includes the *text* of the Constitution.[160]

To accept the binding authority of the constitutional text does not, as a matter of pure logic, entail any degree of deference to original meaning. One could, in principle, treat all of the text as if it were written and adopted (or even handed down by God) yesterday. The question then would be, "what do these words mean to us now?" Although such an approach is possible, it is oddly ahistorical. We know that the Constitution was not adopted yesterday. We also know that text alone has no meaning—meaning also requires context.[161] If we are to avoid ahistoricism, we will wish to pay attention not only to the current context, but also to the context in which the constitutional text was adopted.

To illustrate the point, suppose that the Constitution were written in Middle English. Before attempting to apply its text to present-day cases, even a nonoriginalist judge would probably want to understand what the text meant at the time of its adoption. The judge does not need to understand the original text because she believes that the original understanding binds later interpreters. Rather, the modern judge would need to resort to history simply to unearth a comprehensible textual starting point.

In some cases, constitutional interpretation appears to proceed along similar lines. Consider the question of whether the Second Amendment protects a private right of armed self-defense. The relevant text states: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[162] The concept of a "well regulated Militia" is a cypher to most late-twentieth-century readers. In some quarters, it signifies private groups of self-styled patriots ready to defend the people against perceived excesses of government, while to others the term may conjure the image of the national armed forces or of the state units of the national guard.[163]

Assuming that the phrase "well regulated Militia" has no commonly accepted modern usage, a late-twentieth-century interpreter would first wish to discern its meaning in the eighteenth century and then to translate that meaning into modern English. Nothing in this enterprise commits the modern reader to seeking or to following the intentions of the eighteenth-century adopters of the

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160. *See* DWORKIN, *supra* note 28, at 358 (treating the constitutional text as a starting point for interpretation); TRIBE, *supra* note 120, at 14 (same).

161. To give a very simple example, to one who does not know how to read English, the marks on this page mean nothing, or perhaps mean something very different from what they mean to readers of English. *See* Laurence H. Tribe, *Comment* in SCALIA, *supra* note 2, at 77.

162. U.S. CONST. amend. II.

163. *Compare* Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989) (interpreting the Second Amendment to protect an individual right of armed self-defense) *with* Gary Wills, *To Keep and Bear Arms*, N.Y. REV. OF BOOKS, September 21, 1995, at 62 (arguing that the individual right interpretation contradicts the original understanding). *See also* Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 311 n.6 (1991) (collecting sources). Notably, even the individual right interpretation offers little support for the recent rise of the militia movement.

language. But to the extent that *text* matters to the modern interpreter, it sometimes will be nearly impossible to make any sense out of the text without understanding an earlier historical context.[164]

The point is not that English usage has changed dramatically since the late-eighteenth century. Plainly it has not. For the most part, the Constitution does not use archaic language. However, given changed social circumstances, some provisions of the Constitution may appear as if they were written in archaic language. Understanding the original context will typically help us to understand how to apply such texts in the modern world.[165]

We already have encountered one arguable example of a text whose meaning has been obscured by developments since its enactment—the Takings Clause.[166] Given various late-eighteenth-century assumptions about the nature of property rights, early interpreters of the Clause would have understood it to apply only to appropriations, and not to regulations.[167] To the modern legal mind, however, "property" denotes a complex set of relationships, with an emphasis on economic value rather than on older notions of the right to exclude. Plainly, regulation may diminish economic value as much as confiscation.[168]

How does the shift in context bear on the interpretive exercise? To the originalist, the question answers itself. She will prefer the meaning generated by the historical context during the period of adoption over the meaning that the Clause might bear today.

At first, it might appear that, conversely, a nonoriginalist would deem the older meaning irrelevant.[169] The modern context, by assumption, provides a relatively clear meaning which the nonoriginalist should implement. Yet even a nonoriginalist may deem the older meaning relevant, albeit for a different reason from the one upon which the originalist relies.

Most nonoriginalists will consider value arguments relevant. In applying a constitutional provision, the nonoriginalist will ask, among other things, how best to implement the values at the provision's core. Blinding oneself to the provision's original context may impoverish the modern interpreter's understanding of the values that it protects. Putting the matter in the affirmative, knowledge of the original meaning of a constitutional provision will enable the nonoriginalist interpreter to construct the best, most coherent account of the

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164. *See* Brest, *supra* note 1, at 208-09 (arguing that textualist and intentionalist arguments converge).

165. *See* Lessig, *supra* note 96, at 410-14 (discussing translation).

166. *See supra* notes 111-112 and accompanying text.

167. *See* Treanor, *supra* note 112, at 782. The contrarian reader who contests this historical account should substitute her own favorite example, as the argument does not rest on the historical accuracy of the particular illustration.

168. For an interesting attempt to grapple with the effects of changes in the conception of property, see Lucas v. South Carolina Coastal Comm'n, 505 U.S. 1003, 1034-36 (1992) (Kennedy, J., concurring).

169. *See supra* notes 111-112 and accompanying text (arguing that Lessig's view entails this approach).

provision.[170]

Returning to the Takings Clause example, the modern reading seems to provide protection for a wide assortment of economic interests. Yet in the post–New Deal era, courts have been reluctant to subject economic regulation to anything but the most minimal scrutiny. Robust enforcement of the modern meaning of the Takings Clause fits uncomfortably with the remainder of modern constitutional law.

By attempting to recapture the earlier meaning of the Clause, a modern court searches for an understanding of the values that the Clause serves that coheres with, rather than contradicts, other tenets of modern constitutional law. Thus, a nonoriginalist would not try to implement the original understanding of the Takings Clause simply because it is the original understanding. Instead, she would ask what values would be protected by a Takings Clause that primarily protects against confiscation. She might account for such a vision by emphasizing the "private" in "private property"—connecting the ability to exclude others from one's real and tangible personal property to a conception of the person.[171]

Having located in the relevant provision a core value that coheres with the rest of constitutional law, the modern reader need not, of course, consider herself bound by all features of the original understanding. Applying the core value that protected only against confiscations in the eighteenth century may lead to broader (or narrower) protection in the modern era. The original context provides the modern reader with "paradigm cases,"[172] which can be used to locate in the text a suitable value to enforce.[173] However, the paradigm cases do not themselves supplant the text or even the core value.[174]

Resort to historical context enables the nonoriginalist judge to root normative

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170. I emphasize fit here in much the same way that Ronald Dworkin does—although note that Dworkin's conception of the relevance of context appears to be more intentionalist than necessary. In distinguishing his views from those of strict originalists, Dworkin nonetheless deems intentions relevant as such, stating that "[w]e turn to history to answer the question of what they intended to *say*, not the different question of what *other* intentions they had." Dworkin, *supra* note 133, at 48.

171. *See generally* C. Edwin Baker, *Property and its Relation to Constitutionally Protected Liberty*, 134 U. PA. L. REV. 741 (1986) (analyzing the values that underlie conceptions of property and property rules).

172. Rubenfeld, *supra* note 117, at 1169-71.

173. *See id.* at 1170 ("Courts should consult this history not to discern what some set of authoritative speakers would have said about the interpretive questions that judges alone must answer, but to illuminate the core ideas that underlie the constitutional language.").

174. Of course, the question of how to describe the paradigm case can be quite tricky. For example, there would be no dispute that Chisholm v. Georgia, 2 U.S. 419 (1793), was the paradigm case to which the Eleventh Amendment responded. Yet one could describe the paradigmatic problem alternatively as a problem with diversity jurisdiction, or more generally, as a problem with private suits against states. *See* Hans v. Louisiana, 134 U.S. 1 (1890). In the Supreme Court's recent decision in Seminole Tribe v. Florida, 116 S. Ct. 1114 (1996), the Court takes a relatively broad view. In responding to the argument that state sovereign immunity applies to diversity cases but not to federal question cases, the Court states that in amending Article III, the drafters of the Eleventh Amendment did not specify that sovereign immunity applies in federal question cases because at the time, federal district courts did not have federal question jurisdiction. *See id.* at 1130.

arguments in values that derive from the Constitution's text. This kind of invocation of original meaning does not rely on the conventional social-contractarian account of originalism. Instead, resort to historical context can be seen as a species of textual or of normative argument, or of both.

VI. ANCESTRAL AND HEROIC ORIGINALISM

In Part V, I argued that the need to look to historical context in order to generate meaning justifies a limited role for original understanding in constitutional interpretation. In its actual practice, however, constitutional law accords greater scope to originalist arguments than contextualism appears to require. If one rejects social-contractarianism but maintains a commitment to providing a descriptively accurate account of constitutional law, then one must provide an alternative justification for the more than minimal role that originalist arguments play in interpreting the Constitution.

Let us begin with a puzzle. Supreme Court Justices and lower court judges routinely cite James Madison's notes and other records of the 1787 Constitutional Convention as if these sources were in some way authoritative. Employing conventional originalist theory, this reliance is problematic. Such theory holds that modern readers should follow the interpretation given the Constitution when it was adopted because the act of ratification gave the Constitution the legitimate force of law.[175] Yet the records of the Convention are a poor tool for discerning the Ratifiers' original understanding because the Convention deliberated in secret. The most comprehensive account of the Convention is contained in Madison's notes, first published more than fifty years after the Convention's conclusion.[176]

Recognizing that the Convention records are a poor tool for discerning the views of the Ratifiers, some originalists argue that these records provide a rough sense of the informed opinion of the day.[177] Similarly, according to the conventional originalist view, the Federalist Papers—which were written for the purpose of persuading New Yorkers to ratify the Constitution—merely illustrate public sentiment.[178]

Granting that Madison's notes and the Federalist Papers have some relevance to the social-contractarian originalist enterprise, I would argue that this should not be their principal relevance in constitutional interpretation. If we dispense with social-contractarian premises, the views of the Framers—as opposed to the

175. *See* BORK, *supra* note 2, at 144 (1990) (discussing views of the Ratifiers); Scalia, *supra* note 144, at 856 (describing records of the ratifying conventions' debates as an essential element for originalist jurisprudence).

176. *See* Baade, *supra* note 62, at 1048.

177. *See* Monaghan, *supra* note 10, at 725-26 (noting that "while the term original intent is commonly used, original understanding better conveys the public dimensions of originalism").

178. *See, e.g.*, Sun Oil Co. v. Wortman, 486 U.S. 717, 723 (1988) (explaining that debates at the Constitutional Convention provide evidence of the background expectations about the way that the Full Faith and Credit Clause would operate).

Ratifiers—are relevant to constitutional interpretation for two primary reasons. First, we care about what the Framers thought because, whether we like it or not, our own understanding has been shaped against the backdrop of theirs. Second, we believe that the Founders of the Republic had insight into the problems of government which their handiwork addressed. I refer to the interpretive techniques that correspond to these reasons as *ancestral* and *heroic* originalism respectively.

A. ANCESTRAL ORIGINALISM

To see how ancestral originalism operates, suppose that a judge generally rejects social-contractarianism, believing that she should interpret the Constitution to give effect to the core values of contemporary society. Nevertheless, discerning those values may require engaging originalist sources. As an initial matter, the thought patterns of a judge educated in the American constitutional tradition inevitably will be influenced by the Framers' views, whether or not she takes explicit account of those views. On many important constitutional issues, the various positions in the contemporary debate will have developed in response to arguments first set forth by the Framers. Thus, we may think of Madison et al. as framers of the *debate* about the Constitution as well as Framers of the Constitution itself.

Of course, it is one thing to say that a judge's thought patterns will be indirectly influenced by the Framers' thoughts. It is quite another to say that a judge consciously ought to give weight to the Framers' views. The case for ancestral originalism relies upon the claim that tracing the historical origins of an idea elucidates the meaning of the idea and opens one up to possible meanings that may not be immediately apparent from an ahistorical perspective.

Consider a concrete example—the question of whether an Act of Congress directing a state legislature to pass a law violates the Constitution's protections for state sovereignty. In *New York v. United States*,[179] the Court invalidated such federal "commandeering." Justice O'Connor's opinion for the Court noted that at the 1787 Constitutional Convention, the Framers chose a system of dual sovereignty in which the federal government could regulate the People directly, without relying on state intermediaries as it had to under the Articles of Confederation.[180] In dissent, Justice Stevens protested that the point of the Constitution was to increase federal power over the States, and therefore, absent express prohibitory language, the Constitution should not be construed as removing regulation through state intermediaries as an option.[181] Importantly, neither the majority nor dissenting opinion professed that its reading should be preferred because of the 1787 understanding of the *words* in question; rather, each sought to ground its purposive interpretation in a conception of the

179. 505 U.S. 144 (1992).
180. *See id.* at 163-66.
181. *Id.* at 210.

Framers' design. As a more general matter, because we live in a political world shaped in significant measure by the Framers' vision,[182] we would do well to consult that vision as a presumptive starting point for contemporary analysis.

The contemporary debate about the role of the "canon" of Western literature, philosophy, art, and history in American education casts light on the idea and the scope of ancestral originalism.[183] The best arguments for retaining a core Western canon do not assume that Western culture is superior to other cultures. Rather, persuasive traditionalist arguments emphasize the degree to which contemporary American civilization is part of a Western culture with deep historical roots. Thoughtful traditionalists thus emphasize that understanding contemporary American civilization requires a thorough grounding in Western Civilization.[184] Conversely, critics of a narrowly defined canon do well to emphasize the pluralist character of contemporary American civilization—especially given the non-Western origins of large proportions of the population.[185]

The debate over the canon contains both a descriptive and a normative component. As a descriptive matter, the disputants disagree over the extent to which contemporary American civilization is rooted in Western culture.[186] As a normative matter, the disputants recognize that the canon will play some role in shaping the future evolution of American civilization.[187] Along this front, traditionalists sometimes claim superiority for Western culture,[188] but more

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182. To be sure, the size and scope of the federal government greatly exceed what the Framers originally contemplated. But the particular shape of the national administrative government continues to reflect original design. *See* ACKERMAN, *supra* note 13, at 19-20, 34-57, 165-67.

183. *See generally* N.Y. STATE SOC. STUDIES REV. AND DEV. COMM., ONE NATION, MANY PEOPLES: A DECLARATION OF CULTURAL INDEPENDENCE (June 1991) [hereinafter ONE NATION].

184. *See* Arthur M. Schlesinger, Jr., *A Dissenting Opinion*, *in id.* at 45, 46 (asking whether, instead of "cultivating and reinforcing ethnic differences," it would "not be more appropriate for students to be 'continually' encouraged to understand the American culture in which they are growing up and to prepare for an active role in shaping that culture").

185. *See id.* at 1 (majority report) (citing demography as a basis for multiculturalism).

186. *Compare* RICHARD BROOKHISER, THE WAY OF THE WASP 22 (1991) (characterizing American Indian culture as a "sideshow of American history" and stating that "black slaves were in no position to shape the institutions of WASP society directly") *and* Arthur M. Schlesinger, Jr., *History as Therapy: A Dangerous Idea*, N.Y. TIMES, May 3, 1996, at A31 (disagreeing with the claim that European, African, and Amerindian culture contributed to American history in equal measure, and claiming that "the formative American political ideas . . . are peculiarly European in origin") *with* MOLEFI KETE ASANTE, KEMET, AFROCENTRICITY AND KNOWLEDGE 161-93 (1990) (arguing that traditional American institutions ignore the African influences on African-American culture and American culture in general) *and* Hans Bak, *Introduction* to MULTICULTURALISM AND THE CANON OF AMERICAN CULTURE xi (Hans Bak ed., 1993) (noting how some multiculturalists argue that "it may be time to acknowledge multiculturalism as a 'fact' of America").

187. *Compare* ONE NATION, *supra* note 183, at 1 (majority report) ("If the United States is to continue to prosper in the 21st century, then all of its citizens, whatever their race or ethnicity, must believe that they and their ancestors have shared in the building of the country and have a stake in its success.") *with id.* at 45 (dissenting opinion) (warning of "the danger of a society divided into distinct and immutable ethnic and racial groups, each taught to cherish its own apartness from the rest").

188. *See* BROOKHISER, *supra* note 186, at 29-39 (listing six characteristics which, in the author's view, are uniquely combined in white Anglo-Saxon Protestants and account for American peace and prosperity).

commonly invoke the supposed benefits that come from sharing a single, national, linguistic, and cultural identity.[189] Conversely, some critics claim primacy for non-Western cultures,[190] but more typically invoke the supposed benefits that come from a multicultural, pluralist society.[191]

Returning to constitutional interpretation, it appears that ancestral originalism roughly corresponds to the traditionalist position in the descriptive debate over the canon. To the extent that we believe that the Framers' vision continues to shape our existing political institutions, we do well to study their vision.[192]

B. HEROIC ORIGINALISM

Like the debate about the canon, the debate about the proper role of originalist argument in constitutional interpretation is a debate about what we want our institutions to become. If we regarded the role that the Framers' vision has played in shaping us with indifference, we would stop at ancestral originalism. However, we also value the views of the Framers because we believe that in many respects they were wise and farsighted. To a significant degree, they are our heroes. Thus, *heroic* originalism supplements ancestral originalism.

Together, the ancestral and heroic originalism models provide a useful basis for understanding how arguments that invoke the original meaning fit within an otherwise nonoriginalist context. First, both conceptions explain why we care at least as much about the views of the Framers as we care about the views of the Ratifiers. The act of ratification—so critical to legitimacy on a social-contractarian account—tells us relatively little about the design of the Constitution. Instead, if we seek legitimacy in other sources, the ancestral model looks to the Founding for the genesis of a political philosophy that continues to influence us. The Constitutional Convention of 1787 was critical in this regard. Similarly, we accord heroic status to those who participated in the "Miracle in Philadelphia," rather than those who attended the ratifying conventions.

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189. *See, e.g.*, ARTHUR M. SCHLESINGER, JR., THE DISUNITING OF AMERICA 80 (1991) (stating that "[t]he genius of America lies in its capacity to forge a single nation from peoples of remarkably diverse racial, religious, and ethnic origins"); *Multiculturalism: Sounds Nice but It Has Dangers*, USA TODAY, Dec. 7, 1995, at A11 (reporting speech by former Vice-President Quayle urging that "we should always focus on what unites us—namely, the ideals, the goals, and the culture of our country").

190. *See, e.g.*, ASANTE, *supra* note 186, *passim* (arguing that the Greek foundation of European culture derives from Egyptian culture); GEORGE G. M. JAMES, STOLEN LEGACY, *passim* (reprint 1988) (same).

191. *See, e.g.*, HENRY LOUIS GATES, JR., LOOSE CANONS: NOTES ON THE CULTURE WARS xiv-xvii (1992) (arguing that given the fact of heterogeneity, multiculturalism offers the best hope for transcending differences to forge a civic culture open to all); Michael Walzer, *Pluralism: A Political Perspective*, *in* HARVARD ENCYCLOPEDIA OF AMERICAN ETHNIC GROUPS 781, 784-85 (Stephan Thernstrom ed., 1980) (arguing that pluralism sustains the culture of minority groups against assimilation, celebrates cultural identity, and builds the community).

192. Note, however, that the ancestral model need not be static. The ancestral model views the relation of the present to the past as one of organic preservation; the present need not treat the Constitution as an artifact. *See generally* PAUL W. KAHN, LEGITIMACY AND HISTORY (1992) (associating artifacts with the model of "making" and organisms with the model of "maintenance," but concluding that ultimately neither model solves the problem that time poses for popular sovereignty).

Of course, many of the representatives to the Constitutional Convention were also vocal participants in the ratification debates. But it is the former capacity that often gives them their current authority. Thus, although Madison, Hamilton, and Jay authored the Federalist Papers as ratification proponents, one often encounters citations of the Federalist Papers as support for the views of "the Framers." This does not reflect sloppy history, but instead an implicit acceptance of the ancestral and heroic models.[193]

Furthermore, ancestral and heroic originalism explain how post-enactment events or normative arguments can outweigh evidence of original intent. Under the ancestral model, unearthing the root of modern political institutions or arguments sometimes will reveal that they rest on factually or morally outdated premises. In terms of heroic originalism, we might say that we do not engage in unqualified hero worship. When the Framers' values present a profound conflict with the values of contemporary society—for example, in their acceptance of certain racial or sexual prejudices—we will not deem the Framers heroes.

The Supreme Court's reasoning in *Brown v. Board of Education*[194] rests on just this sort of discounting of the Framers'[195] authority. The Court stated:

> In approaching this problem, we cannot turn the clock back to 1868 when the [Fourteenth] Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.[196]

Whether changes in the institution of public education—or, as the *Brown* Court also suggests, advances in psychological knowledge[197]—were so profound as to warrant entirely discounting the views of the Framers of the Fourteenth Amendment constitutes a contestable (and contested)[198] proposition. But the Court's more basic point is surely sound. A Congress that had only seen the abolition of slavery within the preceding few years was not fully qualified to judge whether

193. Note that Jay was not only a representative to the Convention, but he also played the smallest role in authoring the Federalist Papers. *See* Randy E. Barnett, *The Relevance of the Framers' Intent*, 19 HARV. J.L. & PUB. POL'Y 403, 408-09 (1996).

194. 347 U.S. 483 (1954).

195. As is customary, I refer to the "Framers" of the Fourteenth Amendment in the same way that one refers to the Framers of the original Constitution. In a technical sense, every amendment will have its Framers. Under the ancestral and heroic models, a judge rigbtly gives greater deference to the views of the Framers of the original Constitution, the Bill of Rights, and transformative amendments than to the Framers of a more technical amendment. There is, however, no need to distinguish sharply between transformative and technical amendments, as the ancestral and heroic models are a matter of degree.

196. *Brown*, 347 U.S. at 492-93.

197. *See id.* at 494 & n.11.

198. *See* Missouri v. Jenkins, 115 S. Ct. 2038, 2064 & n.2 (1995) (Thomas, J., concurring) (questioning the validity of psychological studies cited in *Brown* purporting to sbow that de jure segregation harmed black students by generating "a feeling of inferiority").

segregation could be consistent with equality. No doubt many in Congress had views on the question, but those views were at best projections and at worst expressions of prejudices. As such, they did not constitute the kind of wisdom to which the Court nearly a century later would reasonably defer.

By 1954, the lawfulness of segregation posed a question as to which the history of segregation provided considerably more information than did the understanding of the Fourteenth Amendment's Framers. To anyone who did not willfully blind herself to reality, the experience of living under Jim Crow taught beyond any reasonable doubt that, at least as practiced in the United States, separate was not equal.[199]

Of course, changed circumstances do not inevitably render the Framers' understanding irrelevant. For example, consider the question of whether the Tenth Amendment imposes any judicially enforceable limits on federal legislation, beyond the requirement that some power delegated by Article I must authorize the legislation. In *Garcia v. San Antonio Metropolitan Transit Authority*,[200] the Supreme Court essentially held that it does not. Relying on Madison's view that the Constitution protects state sovereignty and individual liberty through structural mechanisms, the *Garcia* Court stated that "the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself."[201] The Court explained that, among other things, the states "were given . . . direct influence in the Senate, where each State received equal representation and each Senator was to be selected by the legislature of his State."[202]

This argument is anachronistic. Since the adoption of the Seventeenth Amendment in 1913, the people of each state directly elect their Senators. Thus, one of the original assumptions underlying the view that structural provisions adequately protect state sovereignty no longer holds. Accordingly, under ancestral or heroic originalism, a modern interpreter might conclude that judicially enforceable norms of state sovereignty are now necessary, even if they were not in Madison's time.

Before entirely discounting the Framers' perspective, however, it pays to ask if we can learn from it. In this context, consider the possibility that the political safeguards for state sovereignty include a structural mechanism that the Framers did not anticipate: the existence of national political parties that coordinate the work of state and federal office holders.[203] If political parties do an adequate job of protecting state sovereignty, then the *Garcia* Court may well have been correct in relying on structural mechanisms alone to protect state interests.

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199. *See* Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960) (arguing that segregation was a legal mechanism intended to disadvantage blacks).

200. 469 U.S. 528 (1985).

201. *Id.* at 550 (citing THE FEDERALIST NO. 39 (James Madison)).

202. *Id.* at 551.

203. *See* Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1522-42 (1994) (arguing that throughout American history, political parties have been the principal institutions responsible for brokering state/federal relations because members of a political party at the state level coordinate their activities with party members at the federal level).

C. ANCESTRAL AND HEROIC ORIGINALISM IN PRACTICE

The Supreme Court already utilizes ancestral and heroic originalism, even if it does not always recognize that it does so. Consider, for example, Justice Brandeis' famous concurrence in *Whitney v. California*.[204] I quote it at length here to illustrate precisely how Brandeis deems the Framers' views relevant to constitutional interpretation. Brandeis wrote:

> Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine .... They recognized the risks to which all human institutions are subject. But they knew ... that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones.[205]

These words sound in heroic originalism.[206] Note first that Justice Brandeis does not trace the First Amendment to its ratification or to its proposal by the First Congress or even to the ratification of the original Constitution, which was accomplished in part because the Federalists promised to introduce a Bill of Rights.[207] Instead, Brandeis traces the philosophy underlying the First Amendment to "[t]hose who won our independence," that is, to the *heroes* of the Revolutionary War. Brandeis glowingly describes their valour and quite consciously links their admirable personal traits with their philosophy of freedom.

Although less obvious, the *Whitney* concurrence also sounds in ancestral originalism. The cadence of Brandeis's prose dares the reader to disagree.[208] "Here is how your ancestors lived," Brandeis asserts. "Will you dare to commit intellectual parricide?"

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204. 274 U.S. 357 (1927).

205. *Id.* at 375.

206. *See* Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in* Whitney v. California, 29 WM. & MARY L. REV. 653, 671-81 (1988) (arguing that Brandeis invokes a heroic notion of the Framers as founders of democracy in the spirit of Athens).

207. *See* Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1187-88 (1996).

208. *Cf.* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 24 (1971) (describing Brandeis and Holmes as "rhetoricians of extraordinary potency [whose] rhetoric retains the power ... to swamp analysis, to persuade, almost to command assent," but nonetheless disagreeing with Brandeis's claims).

I do not contend that all, or even most, judicial invocations of the Framers self-consciously sound in ancestral or heroic originalism. It may well be that courts typically invoke the Framers for the purported purpose of demonstrating the Framers' views pursuant to social contract theory. I do contend, however, that numerous invocations of the Framers sound in ancestral or heroic originalism and that whatever subjective reasons judges may have had for invoking the Framers, often ancestral and heroic originalism better capture the sense of the argument than social contract theory. Consider an opinion authored by Justice Scalia, who generally accepts some form of social-contractarian originalism.[209] Dissenting in *Lee v. Weisman*,[210] Justice Scalia asserted that the "Founders of our Republic . . . knew that nothing, absolutely nothing, is so inclined to foster among religious believers of various faiths a toleration—no, an affection—for one another than voluntarily joining in prayer together, to the God whom they all worship and seek."[211] It is possible that Justice Scalia meant that the Founders' knowledge must be read as a limitation on the text of the Establishment Clause. More likely, however, Justice Scalia invoked the Framers because he believed that the Court was ignoring a lesson that they had learned. He invoked their status and their example.[212]

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209. *See* Scalia, *supra* note 144, *passim*.

210. 505 U.S. 577 (1992) (invalidating an official prayer at a public high school graduation ceremony).

211. *Id.* at 646 (Scalia, J., dissenting).

212. The Court's recent decision in *Seminole*, holding that the Indian Commerce Clause does not authorize Congress to abrogate state sovereign immunity, illustrates how an opinion that appears to invoke social-contractarian originalism may be understood better as an instance of ancestral and heroic originalism. In dissent, Justice Souter argued that "[t]he imperative of legislative control [over sovereign immunity] grew directly out of the Framers' revolutionary idea of popular sovereignty." *Id.* at 1173 (Souter, J., dissenting). Under the social contract view of original meaning, the point of this argument would be to show that the Framers expected Congress to have the power to abrogate state sovereign immunity—and therefore the Constitution should be interpreted in accordance with this expectation. But notice that Justice Souter suggests more. Popular sovereignty is not merely a concept with which the Framers saddled us. It continues to be a core ideal of American democracy, *cf. supra* Part IIIA (discussing Ackerman's notion of popular sovereignty); *infra* Part V (discussing the relation between popular sovereignty and original meaning), and that is how Justice Souter's opinion treats it. Thus, Justice Souter invokes ancestral originalism. Moreover, by referring to popular sovereignty as a "revolutionary idea," Justice Souter invokes the heroic status of the Framers in much the same way as Justice Brandeis did in *Whitney*.

Similarly, consider Nixon v. Fitzgerald, 457 U.S. 731 (1982), holding that the President enjoys absolute immunity against civil suits for damages based on official acts. In an important footnote, Justice Powell's opinion for the Court discusses the "historical evidence from which it may be inferred that the Framers assumed the President's immunity from damages liability." *Id.* at 750 n.31. The opinion's discussion of the course of the debates at the Constitutional Convention and the views held by the delegates to the Convention might appear to rest on the familiar social-contractarian view of original meaning. Yet Justice Powell's discussion of the views of the Framers is of a piece with his discussion of the views expressed by Thomas Jefferson during his Presidency and by Justice Story, writing nearly half a century after the Constitutional Convention. *See id.* Justice Powell connects the original understanding to the entire tide of American history, stating that in addition to its roots in the original understanding, "powerful support" for his argument "derives from the actual history of private lawsuits against the President." *Id.* As Justice Powell notes in the main text of the opinion, the view he espouses is "rooted in the constitutional tradition of the separation of powers and supported by our

Although ancestral and heroic originalism often work in tandem, in some respects they proceed from different premises. When they do, it may be important not to conflate the two kinds of arguments. For example, in Brandeis's *Whitney* concurrence, it is not entirely clear whether we should honor the Founders' views about freedom and courage simply because the Founders expressed these ideas and because they shaped the world we inhabit, or whether we should honor the Founders' views because those views deserve our respect, regardless of who held them. The conflation can lead to overvaluing original meaning, because the conditions necessary to accord the Framers special deference as our ancestors sometimes differ from those necessary to accord them special deference as our heroes.

Indeed, properly understood, ancestral and heroic originalism recognize that in some instances the fact that the Framers held some view about a constitutional provision should count as affirmative evidence *against* that view. I shall illustrate this claim with an example involving the meaning of the Fourteenth Amendment.[213]

Imagine that in 1997 a state prohibited the practice of law by women. Under the modern view of the Equal Protection Clause, such a prohibition must satisfy (at least) intermediate scrutiny,[214] which it undoubtedly would fail. How would the law fare under the original understanding of the Fourteenth Amendment? In *Bradwell v. Illinois*,[215] decided a mere four years after the Fourteenth Amendment's adoption, the Supreme Court upheld such a law. Assuming that the *Bradwell* Court's view broadly reflected the contemporary views of the almost exclusively male legal community about gender equality, one could fairly attribute the Court's view to the Framers of the Fourteenth Amendment.[216] How can we reconcile modern doctrine with the original meaning?

Bobbitt might say that the conscience of the judge must mediate the conflict between doctrine and history. In other words, the considerations favoring the modern view *outweigh* the original understanding. The result is surely desirable, but the process appears ad hoc.

A more committed originalist like Ackerman would probably resort to synthe-

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history." *Id.* at 749. The opinion sounds in ancestral originalism by connecting the original understanding to a continuous and ongoing tradition; it sounds in heroic originalism by noting the special place accorded to the wisdom of the Framers. *See id.* at 750 n.31 ("[H]istorical evidence must be weighed as well as cited. When the weight of evidence is considered, we think we must place our reliance on the contemporary understanding of John Adams, Thomas Jefferson, and Oliver Ellsworth.").

213. I have used this example in two essays. *See* Michael C. Dorf, *A Nonoriginalist Perspective on the Lessons of History*, 19 HARV. J.L. & PUB. POL'Y 351, 356-58 (1996) [hereinafter *A Nonoriginalist Perspective*]; Michael C. Dorf, *A Comment on Text, Time, and Audience Understanding in Constitutional Law*, 73 WASH. U. L.Q. 983, 986-88 (1995).

214. *See* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 152 (1994) (Kennedy, J., concurring) (noting that "[i]n over 20 cases beginning in 1971 . . . we have subjected government classifications based on sex to heightened scrutiny").

215. 83 U.S. 130 (1872).

216. The fact that the text of the Fourteenth Amendment endorses a gender line for voting, *see* U.S. CONST. amend. XIV, § 2 (referring to "male inhabitants"), tends to confirm this inference.

sis—contending perhaps that the Nineteenth Amendment's expression of gender equality "relates back" to the Fourteenth's requirement of equal protection. But recall from our earlier discussion that one might alternatively read the Nineteenth Amendment's reference to voting as implying that the Constitution does not contain a *general* requirement of gender equality. A determined Ackermanian then might claim that the women's rights movement of the 1970s (or 1940s? or 1850s?) constituted an informal amendment which the judge must construe along with the text of the Fourteenth Amendment. We have already explored the shortcomings of such devices, however.[217]

Now consider the approach of ancestral and heroic originalism. When intervening developments reveal that the Framers lacked expertise, we may discount their views. In the present case, the Framers' views have not merely become outdated. If we ask, "why did the Framers of the Fourteenth Amendment believe most forms of gender discrimination to be permissible?" we will find an answer that bears directly on our modern problem.

> In 1868 the Equal Protection Clause was widely understood to permit many governmental gender-based classifications, because the legal and social culture of the time was the product and producer of gender-stereotyped thinking. Yet our (nonoriginalist) sources of constitutional meaning tell us that the Equal Protection Clause treats as invidious those classifications that disadvantage groups that have traditionally been subject to discrimination in this way.[218]

Like a witness whose testimony is so incredible as to persuade the jury that the facts are contrary to what the witness asserts, on some occasions the reasoning of the Framers—viewed in modern perspective—will be so flawed or distasteful as to suggest that the Constitution means the opposite of what they assumed. Neither contractarian originalism nor an eclecticism that encompasses contractarian originalism can explain this phenomenon. Ancestral and heroic originalism can.[219] During the century and a quarter since *Bradwell*, our factual assumptions about the differences between men and women have changed so

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217. *See infra* Part IIIA.

218. Dorf, *A Nonoriginalist Perspective*, *supra* note 213, at 358.

219. In some respects, ancestral and heroic originalism treat original meaning in much the way that Ronald Dworkin argues that a judge ought to treat legislative history. As Dworkin explains, the judge "treats the various statements that make up the legislative history as political acts that his interpretation of the statute must fit and explain, just as it must fit and explain the text of the statute itself." DWORKIN, *supra* note 28, at 314. Ancestral originalism especially is sensitive to fit in this way. In addition, original meaning may sometimes be exploited in different, indeed contrary, ways. In the gender-discrimination example, the very poor fit between the Framers' concrete expectations and the ideal we believe the Equal Protection Clause embodies leads us to count the Framers' concrete expectations as evidence against themselves. This goes well beyond Dworkin's view that a judge may *discount* concrete expectations that are inconsistent with the broader purposes of the text. *See id.* at 363 (justifying *Brown* on the ground that the conflict between the "framers' concrete opinion about segregation" and "their more abstract convictions about equality" required the Court to ignore the former).

much as to break the ancestral chain. Similarly, modern views about the immorality of gender discrimination place the Framers of the Fourteenth Amendment in a particularly unheroic light.

The question remains, however, whether ancestral and heroic originalism reconcile contemporary value arguments and historical practice at too high a price. What empowers a court to say that the Framers' values are simply too distasteful to count as support for a given proposition? Does my proposed use of ancestral and heroic originalism contain the same flaw as Bobbitt's? In other words, is the account's apparently selective use of history unprincipled?

Questions such as these assume that originalism is the presumptively correct starting point for constitutional interpretation so that departures from original understanding require a special justification. Yet that assumption is not shared by nonoriginalists, nor is it self-justifying. The privileging of original understanding rests on a controversial view of legitimacy. As I explain below, ancestral and heroic originalism rest on a different understanding of legitimacy.

D. LEGITIMACY

I have claimed in this Part that reconceptualizing some significant portion of originalist argumentation as heroic or ancestral originalism can narrow the gap between a normatively attractive nonsocial-contractarian account of constitutional law and a descriptively accurate account that recognizes a role for original meaning. What does the shift from social-contractarian to non-contractarian originalism imply for legitimacy?

The traditional view of originalism perceives legitimacy as deriving from the act of lawmaking. Because ratification constitutes the last necessary step in the process, conventional originalism emphasizes the intent of the Ratifiers.[220] Ancestral and heroic originalism use original meaning to legitimate constitutional interpretation in a different manner. Under these models, an appeal to the Framers constitutes an appeal to moral authority and expertise. Other things being equal (or even somewhat less than equal), if the Framers thought a constitutional provision should work in a particular fashion, that fact counts as an argument in favor of it working in that manner. The Framers' unique historical position and whatever wisdom we believe they possessed justify a degree of deference.

Ancestral and heroic originalism are less ambitious than social-contractarian originalism. Unlike strict originalism, ancestral and heroic originalism do not purport to constitute the sole basis for legitimate interpretation. Indeed, ancestral and heroic originalism cannot exist on their own. They only operate within an eclectic context that includes a significant role for normative arguments that, among other things, test the status of the Framers' views. Within such a context,

220. Of course, a variant of traditional originalism could focus on the intent of *both* the Framers and the Ratifiers, as both are necessary steps in the enactment of a constitutional provision. *Cf.* Brest, *supra* note 1, at 214-15 (describing the problem of determining who the Adopters are).

though, ancestral and heroic originalism fit more comfortably with other forms of argument than does conventional originalism.

Moreover, ancestral and heroic originalism invite the interpreter to expand her search for constitutional meaning. If we appeal to the Framers because we believe that their unusual place in history as well as their wisdom make their views especially authoritative, should we not also consult the views of other historically well-situated, wise actors? Although he did not attend the Constitutional Convention, Thomas Jefferson holds a place in the constitutional pantheon—his ideas certainly affected the final document, especially the Bill of Rights.[221] Abraham Lincoln was assassinated before the adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments, but his thoughts and his conduct of the Civil War exerted a major influence on their eventual shape—not to mention our more general views of the Union.[222]

In short, ancestral and heroic originalism ascribe to the Framers an extremely important role, but others have roles to play as well. In particular, ancestral and heroic originalism invite us to construct a nonoriginalist picture of history that accords weight to post-enactment developments. I sketch such an account below.

E. POST-ENACTMENT HISTORY

In the previous Sections of this Part, I provided some examples of how post-enactment events can call into question the premises of the original understanding of a constitutional provision. In this Section, I argue that historical events often inform constitutional interpretation more directly and in a way that reinforces the ancestral and heroic models.

We have already seen the use of post-enactment history in *Brown*. The experience of Jim Crow did not merely undermine the case for deferring to the views of the Framers of the Fourteenth Amendment about the legality of segregation. That experience also painted for the Court a vivid picture of segregation as it actually existed, so that the Court could assert with confidence that *separate could not be equal*.[223]

Other landmark twentieth-century cases use history in much the same way.

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221. *See* TRIBE & DORF, *supra* note 26, at 6, 122 n.2; SCALIA, *supra* note 2, at 38 (stating that he too finds Jefferson's views relevant, albeit for the rather different purpose of discerning "how the text of the Constitution was originally understood").

222. *See* GARY WILLS, LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA 131-47 (1992) (describing how the Gettysburg Address transformed Americans' understanding of the concept of equality in the Declaration of Independence and our understanding of the Union). Charles Miller makes a similar point in recognizing the role of "ongoing history" in constitutional interpretation. CHARLES A. MILLER, THE SUPREME COURT AND THE USES OF HISTORY 26 (1969). However, Miller distinguishes ongoing history from conventional originalism, *id.* (describing "intent history"), without recognizing the use I describe as ancestral and heroic originalism. Thus, his account does not adequately explain how ongoing history modifies the lessons to be drawn from the Founding.

223. Of course, other events also influenced the Court's (and the Nation's) understanding. Perhaps the most prominent of these was the experience of the Second World War. *See generally* DAVID BRINKLEY, WASHINGTON GOES TO WAR (1988).

For example, in *West Coast Hotel Co. v. Parrish*,[224] the Supreme Court abandoned close judicial scrutiny of economic legislation, citing the Great Depression as evidence of the inadequacies of the laissez-faire theory that had supported the use of such scrutiny.[225]

In its partial re-affirmation of the right to abortion, the Supreme Court in *Planned Parenthood v. Casey*,[226] characterized both the *Brown* Court's decision to overrule *Plessy v. Ferguson* and the *West Coast Hotel* Court's decision to overrule *Children's Hospital v. Adkins* as resting on a perception of changed facts.[227] The immediate issue that prompted this characterization was the *Casey* Court's effort to explain the circumstances justifying a departure from the stare decisis in landmark cases. Whether the *Casey* Court's account of stare decisis is convincing is beyond the scope of this article. But at a more fundamental level, surely the Court was correct in noting that the historical events it described—Jim Crow and the Great Depression—were relevant to the underlying constitutional questions addressed in *Brown* and *West Coast Hotel* respectively.

The Court does not always take post-enactment history into account, even when it would seem quite relevant. Consider, for example, *U.S. Term Limits, Inc. v. Thornton*,[228] in which a five-to-four majority held that a state may not impose term limits on members of Congress. Both the majority and the dissent relied almost exclusively on the history surrounding the adoption of the Qualifications Clause.[229] The majority found that the Clause was meant to provide the exclusive qualifications for members of Congress;[230] the dissent agreed that Congress cannot impose additional qualifications, but argued that the states may.[231]

The critical factor for the dissent was that state governments do not derive their powers from the Constitution.[232] The Qualifications Clause excludes additional federally imposed qualifications because it does not authorize such additional qualifications. As the Tenth Amendment confirms, however, states differ from the federal government in that states possess reserved powers. Because the Constitution does not divest the states of the power to set term limits, their reserved powers include the power to impose term limits.

The majority denied that the states' reserved powers could include powers to constrain the federal government.[233] Congress, as a national body, may not be subject to state interference. Based on its canvassing of the Framers' views, the

224. 300 U.S. 379 (1937).

225. *See id.* at 399-400. Of course, the opinion also sounds in legal realism and judicial restraint. *See id.* at 398-99.

226. 505 U.S. 833 (1992).

227. *See id.* at 863.

228. 115 S. Ct. 1842 (1995).

229. *See id.*

230. *Id.* at 1854.

231. *Id.* at 1878 (Thomas, J., dissenting).

232. *Id.* at 1879.

233. *Id.* at 1863 (opinion of the Court).

majority concluded: "The Constitution thus creates a uniform national body representing the interests of a single people."[234]

The dissent vigorously contested this last claim. Emphasizing that the Constitution includes no mechanism for national political action independent of officials elected in state-by-state elections, the dissent argued that the Federal Union is a creation of the states.[235]

Thus, the case seemed to turn on questions going to the heart of constitutional law:[236] What is the nature of the Federal Union? Who are the People? Are they the People of the *United States* or the People of the united *States*? Each side claimed to have the support of the Framers.

The history lessons stopped just after the adoption of the Constitution.[237] Neither side in the debate availed itself of later developments. One can understand why the dissent chose this stance. Justice Thomas, the author of the dissent in *Term Limits*, is the Court's most thoroughgoing originalist. But Justice Stevens and the other Justices who joined his majority opinion are not usually originalists.[238]

Moreover, in ignoring most post-enactment history, the majority squandered an opportunity to strengthen its argument considerably. The Civil War seems to speak directly to the question that divided the Court in *Term Limits*.[239] If "We The People"[240] are just the Peoples of the several states, then why did the southern states' secession effort justify President Lincoln in leading the northern states in a war to preserve the Union? Thrice-wounded in the Civil War, Justice Holmes understood that events on the battlefield had legal consequences. In the course of sustaining the federal treaty power against a claim of reserved state power, he wrote for the Court:

> [W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation.

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234. *Id.* at 1864.

235. *Id.* at 1876 (Thomas, J., dissenting).

236. I say "seemed," because "[b]oth the majority and the dissenting opinions embraced formal structural axioms far broader than necessary to decide what state-passed term limits would do to the federal/state balance of power as a functional matter." Kathleen M. Sullivan, *Dueling Sovereignties:* U.S. Term Limits, Inc. v. Thornton, 109 HARV. L. REV. 78, 81 (1995).

237. Both sides relied on state practice immediately after the adoption of the Constitution.

238. Justices Kennedy, Souter, Ginsburg, and Breyer joined Justice Steven's majority opinion in *Term Limits*.

239. The *Term Limits* majority does not mention the Civil War, and in his concurrence, Justice Kennedy emphasizes that post–Civil War cases supporting the majority's view merely re-affirmed the pre–Civil War understanding. *See U.S. Term Limits, Inc.*, 115 S. Ct. at 1873-74 (Kennedy, J., concurrence).

240. *See supra* note 50.

> The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.[241]

One might argue that Ackerman's theory of constitutional moments captures claims such as these. But note a critical distinction between history as Holmes uses it and as Ackerman would use it. The Civil War, in Holmes' view (and in mine), *proved* that the United States had become a nation.[242] Putting to one side the Thirteenth, Fourteenth, and Fifteenth Amendments, which changed the Constitution's text, the War itself did not constitute an informal amendment to the Constitution. Rather, in the aftermath of the Civil War, the argument that the Union derives its authority from the states is significantly less tenable than it was before the War.[243] History provides judicially noticeable facts that may then form the predicate for other kinds of constitutional arguments. In other words, history teaches lessons.[244]

Looking to history for lessons rather than for constitutional moments dispenses with the need to distinguish between the events that qualify as constitutional moments and all other historical events that fall short of the threshold. Under Ackerman's approach, even very significant events in the latter category will not disturb an earlier understanding of the Constitution.[245] By contrast, *all* historical events can teach lessons to a greater or lesser extent, depending on the context.

In this respect, my conception of the lessons of history more closely re-

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241. Missouri v. Holland, 252 U.S. 416, 433 (1920).

242. In one sense, of course, the Civil War only proved what war always proves—which side was militarily superior. But such a reductionist characterization would ignore the broad principles for which the Civil War was fought, principles which have become central to our national self-consciousness. *See* DWORKIN, *supra* note 133, at 280 ("Constitutional lawyers say that the history and the outcome of the Civil War showed a national commitment to some form of racial equality, and they mean this not as a historical explanation of the causes of the war . . . but as a principle essential to any justification of the slaughter."); WILLS, *supra* note 222, at 121-47. *But see* KAHN, *supra* note 192, at 65 (noting that the Civil War was not immediately understood as transformative, in part because the war had been fought to *preserve* the Union, rather than to *transform* it (citing PHILLIP PALUDAN, A COVENANT WITH DEATH 21 (1975))).

243. To be sure, the Supreme Court bas not always manifested a consistent position on the effect of the Civil War. For example, within the same opinion, the Court states in the Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1872), that the Emancipation Proclamation and the Thirteenth Amendment merely formalized the War's abolition of slavery, *see id.* at 68, *and* that the Thirteenth, Fourteenth, and Fifteenth Amendments manifest no "purpose to destroy the main features of the general system" of national-state relations. *Id.* at 82.

244. Of course, a sophisticated originalist will recognize this point. *See* BORK, *supra* note 2, at 352 (discussing "the lessons history provides about the [constitutional] principles meant to be enforced").

245. Ackerman's recent argument that events in the 1940s comprised a constitutional moment recognizing the Congressional-Executive agreement as an alternative to the treaty power, *see* Ackerman & Golove, *supra* note 48, at 861-96, appears to belie this claim. While important, such events hardly rise to the level of the Civil War or the Great Depression in their effect on the Nation. Yet as I noted in Part III, as constitutional moments proliferate, Ackerman's crucial distinction between higher lawmaking and ordinary politics becomes untenable, and his dualist theory unravels.

sembles Jed Rubenfeld's commitmentarian view of constitutional change.[246] Rubenfeld explains that traditional variants on originalism substitute the tacit consent of successive generations to constitutional change for express consent in the form of ratification. He argues that such theories fail to account for the written nature of the Constitution. A written constitution entails more than a one-time accession to legitimacy, even if each generation repeats the exercise. Setting the Constitution in writing, Rubenfeld argues, implies an ongoing effort to live in accordance with it.[247] Legitimacy, in Rubenfeld's view, derives from a commitment that extends continuously over lifetimes rather than from discrete acts of consent.[248]

Rubenfeld's account dispenses with the need to identify those historical events that rise to the level of constitutional moments. In this respect, it has greater descriptive power than Ackerman's account. Moreover, Rubenfeld's commitmentarianism captures some of the ways in which post-enactment history shapes constitutional meaning. For example, one can characterize the struggle for civil rights in this century as a playing out of a national commitment to racial equality—however contested the precise content of that concept remains.

But commitmentarianism describes only a subset of the lessons of history. History teaches lessons even when events evince no national commitments. The lesson that the *West Coast Hotel* Court drew from the Great Depression provides an example. The Great Depression did not reflect a national commitment to the inadequacy of laissez-faire economics. Indeed, the Great Depression arguably resulted from a strong commitment *to* laissez-faire economic theory. If we disregard the Ackermanian interpretation of the New Deal as reflecting higher lawmaking and view the period as the *West Coast Hotel* Court did—as a demonstration of laissez-faire's inability to revive industrial activity during a depression—then the relevant lessons derive from largely impersonal events. Such events comprise neither consent nor commitment. They are simply facts.

The same point applies in the *Brown* context. The *Brown* Court *repudiated the commitment* to segregation of the southern states. It did so in no small part because of what the Court (and the nation) learned about the nature of segregation during the period between *Plessy* and *Brown*. The historical development of the institution of segregation provided information that was unavailable at the

246. *See* Rubenfeld, *supra* note 117, at 1154-63.

247. *See id.* Justice Story, in a variant of this argument, suggested that the written nature of the Constitution counsels against originalism. According to Story, if the meaning of the written text must be gathered from obscure sources, then it ceases to act as a charter for the people. *See* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 184-85, at 137-38, § 210, at 157-58 (Ronald D. Rotunda & John E. Nowak eds., 1987) (originally published as an abridgement, 1833). Of course, Rubenfeld does not endorse the jurisprudence of plain meaning that Story thus infers. *See* Rubenfeld, *supra* note 117, at 1129-30. *See also* BOBBITT, *supra* note 124, at 707-08 (describing Story's textualist views).

248. *See* Rubenfeld, *supra* note 117, at 1155-56.

time of the framing of the Fourteenth Amendment.[249]

Conceived broadly, post-enactment historical argument as I have described it is a form of prudential or normative argument. In deciding how to interpret a constitutional provision, courts routinely inquire into the costs and benefits of various interpretations. All sorts of unspoken empirical assumptions figure into such calculations. For example, a judge reviewing economic legislation assumes a sufficiently well-functioning market, so that government regulations of supply will be deemed rationally related to price.[250] In allowing overbreadth challenges to laws burdening free speech, judges assume that human beings are cautious and self-interested, so that the chilling effect of such laws justifies relaxation of the rules of third-party standing.[251]

Historical argument in many cases merely constitutes an attempt to ground the courts' empirical axioms in actual experience. In this respect, reliance on post-enactment history represents a constraint on the otherwise relatively undisciplined fields of prudential and normative argument.

VII. POPULAR SOVEREIGNTY AND ORIGINAL MEANING

Contextual, ancestral, and heroic originalism together provide a sound basis for a nonsocial-contractarian understanding of the relevance of original meaning in constitutional interpretation. Nevertheless, these models do not exhaust the possibilities. At least in some circumstances, the social-contractarian account of originalism may be unavoidable. In this Part, I explore the legitimate scope of social-contractarian originalism within a generally noncontractarian framework.

Let us begin with a barely hypothetical interpretive question. The proposed Twenty-Eighth Amendment[252] provides: "The Congress and the states shall have the power to prohibit the physical desecration of the flag of the United States."[253]

Suppose the Amendment were adopted. What would it mean? For concrete-

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249. *See* KAHN, *supra* note 192, at 152 (criticizing Ackerman's interpretation of the overruling of *Lochner* and *Plessy*).

250. *See* Wickard v. Filburn, 317 U.S. 111, 127 (1942) (stating that "[t]he maintenance by government regulation of a price for wheat undoubtedly can be accomplished as effectively by sustaining or increasing the demand as by limiting the supply").

251. *See, e.g.*, Dombrowski v. Pfister, 380 U.S. 479, 486 (1965) (stating that "[b]ecause of the sensitive nature of constitutionally protected expression, we have not required that all of those subject to overbroad regulations risk prosecution to test their rights").

252. I refer to the proposal as the Twenty-Eighth Amendment despite the controversy over whether the Twenty-Seventh Amendment was properly ratified more than two centuries after it was passed by the first Congress. Both houses of Congress have declared their view that the ratification was proper. *See* 138 CONG. REC. S6948 (daily ed. May 20, 1992) (Senate vote); 138 CONG. REC. H3505 (daily ed. May 20, 1992) (House vote). *See generally* Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 YALE L.J. 677 (1993).

253. Katharine Q. Seelye, *House Easily Passes Amendment to Ban Desecration of Flag*, N.Y. TIMES, June 29, 1995, at A1, A19. The Amendment easily passed the House in June 1995, but twice failed in the Senate. *See id.* at A1; Helen Dewar, *Senate Falls Short on Flag Amendment*, WASH. POST, Dec. 13, 1995, at A1.

ness, assume that immediately upon ratification, Congress enacts the Flag Protection Act, which makes "the physical desecration of the flag of the United States" an offense punishable by imprisonment for one year. Assume shortly thereafter, Jane Doe burns a United States flag in front of the Jefferson Memorial to symbolize her disgust with the Twenty-Eighth Amendment and with the Flag Protection Act. Doe moves to dismiss the ensuing indictment as a violation of the First Amendment. She argues as follows: Congress's affirmative power to prohibit flag desecration does not immunize its action from scrutiny under the negative limits of the Constitution, including the First Amendment—just as the Commerce Clause's authorization of the regulation of bumper stickers on cars moving in interstate commerce does not mean that a federal statute prohibiting the placement of bumper stickers criticizing the government on cars that travel in interstate commerce can escape First Amendment scrutiny.[254]

Yet the obvious purpose of the Twenty-Eighth Amendment is to overrule *Texas v. Johnson*[255] and *United States v. Eichman*,[256] which held that laws proscribing flag desecration violate the First Amendment. Even if textually sound, Doe's argument seemingly founders on the intent of the Framers and Ratifiers of the Twenty-Eighth Amendment.

Perhaps we do not need to rely on an intentionalist refutation of Doe's argument. Might we characterize Doe's proposed construction as unsound because it would render the Twenty-Eighth Amendment textually superfluous? What would be the point of granting the government a power that it cannot exercise without violating some other constitutional provision?

This textual argument does not quite work, however. *Johnson* and *Eichman* do not address the question of whether the federal government possesses the affirmative power to proscribe flag-desecration; after *United States v. Lopez*,[257] the argument that the federal government lacks this power is hardly frivolous. Thus, the Twenty-Eighth Amendment lifts a potential bar to the enactment of the Flag Protection Act. It would not be absurd to suppose that Congress and the States would have wished to lift this bar but leave to the Supreme Court the task of determining whether to overrule *Johnson* and *Eichman* as a matter of First Amendment law.[258] Thus, to say that Doe's argument *obviously* fails would seem to require some recourse to the obvious *intent* of those who adopted the Twenty-Eighth Amendment.

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254. *See* Dorf, *supra* note 207, at 1190-91.

255. 491 U.S. 397 (1989).

256. 496 U.S. 310 (1990).

257. 514 U.S. 549 (1995).

258. Of course, the Twenty-Eighth Amendment also authorizes the states to proscribe flag desecration. But the states do not derive their powers from the Federal Constitution. *See supra* text accompanying notes 232-44. Accepting Doe's proposed reading thus would render the Twenty-Eighth Amendment a complete nullity as to the states. If this fact ought to inform our interpretation of the Twenty-Eighth Amendment's application to the federal government—and I cannot say why it should not—for illustrative purposes we may assume for the remainder of the discussion that the hypothetical Twenty-Eighth Amendment refers only to the federal government and is silent as to the states.

Next consider a different strategy for avoiding intentionalism. When a court considers the meaning of a recently enacted amendment, the original understanding and the contemporary understanding are one and the same. No time has elapsed during which the original understanding could have been forgotten or rendered irrelevant. Thus, to say that the obvious intent of the Framers and Ratifiers controls is only to say that the contemporary understanding controls.

This point no doubt holds for a large class of cases. For example, it plays a role in explaining why the courts routinely look to the decisions of the First Congress to recover the original understanding of the Constitution.[259] But in the case I have hypothesized, the equivalence runs in the opposite direction. In 1997, people generally understand that the Twenty-Eighth Amendment overrules *Johnson* and *Eichman* because they remember that this was what the Amendment's proponent's intended (and what its opponents feared). In this case, the contemporary understanding rests on a kind of intentionalism rather than vice-versa.

If, as I believe, we require some version of the social-contractarian view to account for our intuitions regarding the Twenty-Eighth Amendment, how broad a scope must we give to that view? For example, suppose that Doe's case arises 100 years after the adoption of the Twenty-Eighth Amendment. Would it be any more appropriate at that time to discount the views of its Adopters than it would be today? I would like to say that it would be.

Usually the mere passage of time will obscure the once "obvious" meaning of a constitutional provision.[260] The difficulties of reconstructing the original context will plague the quest to recover the original meaning. Accordingly, beginning with a more uncertain footing, the interpreter will feel less secure deferring to the original meaning.

Let us put such problems to one side, however. Suppose that in the particular case, the historical record has preserved the original understanding with great clarity. Might the late twenty-first-century judge still legitimately devalue the original meaning of the Twenty-Eighth Amendment?

Support for doing just this comes from an unlikely source—the countermajoritarian difficulty. As Ackerman notes, the countermajoritarian difficulty is really an "intertemporal difficulty."[261] Ackerman answers the countermajoritarian difficulty by pointing out that the Constitution invoked by the judge to supersede the current majority will was itself the product of a majority—indeed, it was the product of a supermajority of the People acting as creators of higher

259. *See, e.g.*, Myers v. United States, 272 U.S. 52, 136, 174-76 (1926); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 420 (1821); Stuart v. Laird, 5 U.S. (1 Cranch) 299, 309 (1803). *Cf.* Adamson v. California, 332 U.S. 46, 64 (1947) (Frankfurter, J., concurring) (deferring to an earlier interpretation of the Fourteenth Amendment "by judges who were themselves witnesses of the process by which the Fourteenth Amendment became part of the Constitution").

260. *See* Brest, *supra* note 1, at 208.

261. Ackerman, *supra* note 27, at 1045-49.

law.[262] Thus, the question becomes: why should the modern majority bow to the older (super)majority? For Ackerman, dualism provides the answer. The older majority created higher law while the modern majority produced only ordinary law.[263]

As discussed in Part III, Ackerman sees higher law as deriving its content entirely from discrete acts of the higher lawmaking capacity of the People—constitutional moments that result in formal text or in informal amendments. What happens if we replace Ackerman's account of the generation of constitutional norms with an eclecticism that recognizes that a variety of changing factors together produce constitutional meaning at any one time? We will then see the passage of time as quite relevant to the interpretive exercise—even when the original meaning remains clear after many years.

Begin with the case of contemporary interpretation of the Twenty-Eighth Amendment. It would be illegitimate to accept Doe's argument that the Amendment leaves *Johnson* and *Eichman* undisturbed primarily because such an interpretation would thwart the supermajority will that produced the Amendment. Of course, there may be occasions when the text enacted so differs from the intent of its adopters that we must conclude that the drafters failed in their objectives. But surely the Twenty-Eighth Amendment does not constitute such a failure. Reading the Twenty-Eighth Amendment to overrule *Johnson* and *Eichman* is almost certainly the best textual interpretation. Therefore, to read it otherwise would deny the power of a supermajority to use Article V to engineer constitutional change.

A century later, however, the problem's complexion changes. Now a reading contrary to the original understanding does not thwart an existing supermajority will. It does thwart the will of a past supermajority, but this should not bother an eclectic. Any time changed circumstances or changed norms result in a departure from original understanding, a past supermajority's will is arguably thwarted. The core value that supported a contemporary intentionalist interpretation of the Twenty-Eighth Amendment was (super)majoritarianism. In the later era, the case does not directly implicate this value so that the other forms of argument dominate.[264]

Expanding my hypothetical example, assume that the court interpreting the Twenty-Eighth Amendment a century after its adoption faces a case that is essentially the paradigm case that inspired the Amendment.[265] We see that even in such a case, the strength of originalist arguments diminishes over time—both

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262. *Id.* at 1049-50.

263. *Id.*

264. Applying this account to statutory construction would require paying greater attention to legislative history in the period immediately following a statute's adoption than in later periods. *See* ESKRIDGE, *supra* note 55, at 48-80 (describing the practice of dynamic statutory interpretation); *id.* at 207-38 (describing tbe uses of legislative history during different periods).

265. *See* Rubenfeld, *supra* note 117, at 1169-77 (explaining the role of paradigm cases).

because the original understanding no longer necessarily commands supermajority support and because the intervening experience provides the later court with lessons that were unavailable earlier. Originalist arguments weaken even more when the case for decision involves a situation that the provision's adopters did not intend to address directly.

To illustrate the diminishing utility of original meaning over time, let us borrow from Ackerman an explanation that makes sense in an eclectic context as well: When a constitutional provision is first enacted, it typically functions as a sort of super-statute.[266] Situations within the core of such new provisions present the strongest cases for intentionalism. With the passage of time, an amendment becomes absorbed into the entire corpus of the Constitution. The requirement of intergenerational synthesis is as strong for an eclectic as it is for a neo-originalist like Ackerman. Thus, the pull of social-contractarianism diminishes as the factual context shifts from the core paradigm case and as time passes.[267]

Consider one more example. Suppose that some substantial time after the adoption of the Twenty-Eighth Amendment, Texas prosecutes John Roe for burning a Texas state flag in violation of the Texas State Flag Protection Act, which makes "the physical desecration of the flag of the State of Texas" an offense punishable by imprisonment for one year. Roe moves to quash the indictment on the ground that the First Amendment protects his act and that the Twenty-Eighth Amendment by its terms only removes protection against charges of desecrating a United States flag. Roe's textual argument is strong, but is it unassailable?

Critics of the Court's flag-burning decisions tend to advance two principal arguments. First, they argue that the American flag is a unique symbol, so that the doctrinal categories applicable to other communicative acts have no bearing on flag desecration.[268] Second, they argue that proscriptions of the physical act of burning a flag regulate conduct rather than expression.[269] One can invoke both of these arguments in support of the Twenty-Eighth Amendment.

If one views the Twenty-Eighth Amendment as resting on the first premise, then Roe's argument should prevail. Under this view, the Texas state flag does not possess the unique status that the Twenty-Eighth Amendment requires us to understand as inhering in the American flag. On the other hand, if the Twenty-Eighth Amendment stands for a repudiation of the Supreme Court's overall approach to symbolic speech, then the State of Texas may punish Roe. The

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266. *See* ACKERMAN, *supra* note 13, at 96-99; Richard A. Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 SUP. CT. REV. 173, 196 n.63 (comparing individual constitutional provisions to individual precedent cases as they function in the common-law method).

267. *See* DWORKIN, *supra* note 28, at 348-50, 388-89 (discussing the diminishing relevance of original legislative history over time in statutory and constitutional interpretation); Rubenfeld, *supra* note 117, at 1176.

268. *See Johnson*, 491 U.S. at 421 (Rehnquist, C.J., dissenting).

269. *See id.* at 438 (Stevens, J., dissenting).

physical act of burning a Texas flag is no more (or less) speech than the physical act of burning an American flag.

Civil libertarians would like to limit the damage that the Twenty-Eighth Amendment does to the beloved First Amendment. Thus, they (we) will prefer to read the Twenty-Eighth Amendment as resting on the uniqueness of the American flag. As a textual matter, this is sound. *Johnson* rests on the proposition that the First Amendment does not permit the government to distinguish between the communicative burning of a United States flag and other symbolic speech.[270] The civil libertarian can argue that although there is no *principled* way to distinguish burning a United States flag from burning a state flag, the express text of the Constitution dispenses with the need for a principled distinction. The text simply requires us to treat the United States flag as *sui generis*, even if as a matter of logic this is an unsustainable proposition.

I would like to say that this is the best understanding of the Twenty-Eighth Amendment. But I suspect that a commitment to synthesis requires that we first consider whether a principled reconciliation can be accomplished. If the Nineteenth Amendment informs our understanding of the application of the Fourteenth Amendment to gender discrimination,[271] it is hard to see why the Twenty-Eighth Amendment should not inform our understanding of the application of the First Amendment to state flag desecration.[272]

However one resolves this synthetic question, originalist arguments appear to play a fairly minor role. The paradigm case inspiring the Twenty-Eighth Amendment is the burning of a United States flag. Virtually all of the evidence regarding the Framers' and Ratifiers' intent will concern this question. Even if one attempts to "apply" that intent to a new context such as the burning of a state flag, the process will be inevitably interpretive. At that point, eclecticism opens the door to a host of nonintentionalist arguments, which will tend to crowd out intentionalist ones.

There may be an irreducible role for social-contractarian originalism in

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270. *See id.* at 417 (opinion of the Court).

271. *See supra* text accompanying notes 70-73.

272. Indeed, Christopher Eisgruber has argued that to treat the flag-desecration amendment as an unprincipled exception would be problematic because it would require us to forego the proposition that constitutional provisions are statements of principle rather than legislative records. *See* Christopher L. Eisgruber, *Birthright Citizenship and the Constitution*, 72 N.Y.U. L. REV. 54, 86-87 (1997). I fear that some aspects of our Constitution must be seen as legislative records, however. Three examples should illustrate my position. First, I view the unrepresentativeness of the Senate as the unfortunate legacy of contingent historical circumstances. Second, I view the Constitution's failure to set forth a mechanism guaranteeing the basic human needs of the poor as a product of an excessively individualistic ideal of the good life that plays a significant role in American culture but not in the cultures of all other industrial democracies. Third, I regard such provisions as the Fifth Amendment right to indictment by a grand jury and the Seventh Amendment right to a jury in civil cases at law as acceptable if inefficient procedural devices, but I do not see how they can be understood as elaborating essential principles of justice. Although I agree with Eisgruber that we should interpret the Constitution in a principled manner, I see no reason to assume that all of the Constitution's provisions can be founded on the basis of substantively just first principles. Thus, I do not think that a Twenty-Eighth Amendment that applied only to burning the United States flag necessarily would introduce insurmountable jurisprudential difficulties.

constitutional interpretation. That role is a small one, however. Social-contractarian originalism operates principally in cases that are factually and temporally quite close to the paradigm cases that inspired the relevant provision.

VIII. CONCLUSION

How can we make sense of the role that originalist arguments play in eclectic constitutional interpretation? Conventional originalism rests on the political premise that legitimacy derives from following the intentions of the original lawmakers. If we accept that this premise ever holds, do we render illegitimate all decisions that are not based on such intentions?

The easy answer is to say that an eclectic need only accept original meaning as *one source* of legitimacy. Conventional eclectics like Fallon use this strategy. This approach is conceptually coherent in the sense that there is no logical contradiction in saying that constitutional law derives its legitimacy from a variety of sources. But the conventional strategy relies on a definitional fiat: Where originalism's usual premises challenge the legitimacy of other sources, conventional eclecticism redefines originalism as resting on a theory positing that the social contract only partially accounts for legitimacy.[273] Can we do better by seeking an understanding of arguments based on original meaning that coheres with the premises of nonoriginalist eclecticism?

I have argued here that we can. First, eclectics should recognize that most originalist arguments do not necessarily rest on the social-contractarian conception of originalism. Instead, the eclectic can see such arguments as involving claims about context, ancestral or heroic originalism, and the lessons of history. Eclectics can readily integrate these arguments into a coherent philosophy of constitutional law.

Second, our Constitution's presumption in favor of democratic processes provides support for according weight to conventional originalist arguments in the relatively rare cases that are close in time and factual setting to the events inspiring a constitutional amendment. Reliance on democratic values in this small class of cases poses a correspondingly small challenge to the legitimacy of other forms of argument. The challenge is small because our constitutional tradition does not rest solely on democratic values.[274]

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273. In this sense, conventional eclecticism relies on what Laurence Tribe and I have described as "exception-barring." TRIBE & DORF, *supra* note 26, at 89-96 (citing IMRE LAKATOS, PROOFS AND REFUTATIONS: THE LOGIC OF MATHEMATICAL DISCOVERY (1976)).

274. *See* Henry P. Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121, 127-28 (1996) (arguing that the assumption that a majority vote in a national referendum could suffice to ratify a constitutional amendment notwithstanding Article V misapprehends the limited role that simple majoritarianism plays in our constitutional order); Lawrence G. Sager, *The Incorrigible Constitution*, 65 N.Y.U. L. REV. 893, 900-09 (1990) (arguing that the mere fact of supermajoritarian ratification of the original Constitution and subsequent amendments does not ensure its fidelity to principles of supermajority rule). Alternatively, we might say that the conception of democracy embodied in American constitutionalism does not give automatic deference to majority (or even supermajority) decisionmaking. *See* DWORKIN, *supra* note 133, at 15-20.